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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY, and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM U.S., INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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QUESTION PRESENTED

Whether, at the time of Mississippi's statehood in 1817, the lands under the non-navigable but tidally influenced inland waters were conveyed by the United States to Mississippi as part of the state-owned public trust.

PARTIES TO THE PROCEEDING BELOW

In the proceeding before the Mississippi Supreme Court, the appellants were Cinque Bambini Partnership, Carroll W. Allen, Lydia Carroll, Hamilton Allen, Harry B. Kelleher, Spooner Petroleum Company, Enserch Exploration, Inc., and Phillips Petroleum Company. Only Phillips Petroleum Company and Cinque Bambini Partnership are petitioners in this Court.

The appellees below, and the respondents in this Court, were the State of Mississippi and Saga Petroleum U.S., Inc.

RULE 28.1 LISTING

The Rule 28.1 list of parents, subsidiaries and affiliates of Phillips Petroleum Company, a petitioner herein, is contained in Appendix C hereto, p. 75a, *infra*.

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No. _____

PHILLIPS PETROLEUM COMPANY, and
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v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM U.S., INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

The petitioners, Phillips Petroleum Company and Cinque Bambini Partnership, respectfully pray that a writ of certiorari issue to review the judgment and the opinion of the Supreme Court of Mississippi entered in this proceeding.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi, as modified on rehearing, is reported at 491 So.2d 508. It is reprinted in Appendix A hereto, App. 1a-26a, *infra.*

The Findings and Ruling of the Chancery Court of Hancock County, Mississippi, are not officialy reported. They are reprinted in Appendix B hereto, App. 30a-70a, *infra.*

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on May 14, 1986., App. 27a, *infra*. A petition for rehearing was denied on July 30, 1986, accompanied by a modification of the original opinion of the court. App. 28a, *infra*. On October 15, 1986, Justice Whtie signed an order extending the time for filing this petition for writ of certiorari to and including November 28, 1986.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article IV:

> "Section 3. New States may be admitted by the Congress into this Union; . . . ."

Act of March 1, 1817, 3 Stat. 348:

> ". . . the inhabitants of the western part of the Mississippi territory . . . hereby are authorized to form for themselves a constitution and state government . . . and the said state, when formed, shall be admitted into the union upon the same footing with the original states, in all respects whatever."

Resolution of December 10, 1817, 3 Stat. 472, 473:

> *"Resolved* . . . That the state of Mississippi shall be one, and is hereby declared to be one, of the United States of America, and admitted into the union on an equal footing with the original states, in all respects whatever."

The Coastal Wetlands Protection Law, Sec. 49-27-5, Mississippi Code Annotated (Supp. 1986):

> "a) 'Coastal wetlands' means all publicly owned lands subject to the ebb and flow of the tide; which are below the watermark of ordinary high tide; all publicly owned accretions above the watermark of ordinary high tide and all publicly owned submerged water-bottoms below the watermark of ordinary high tide."

STATEMENT OF THE CASE

This land title dispute coming here from the Mississippi Supreme Court involves a major federal question. At the time of Mississippi's "equal footing" statehood in 1817, were the lands under the tidally influenced but non-navigable inland waters conveyed by the United States to Mississippi as part of the state-owned public trust?

A. The nature of the wetlands in issue

The underlying facts are not in controversy. They are accurately summarized in the opinion of the Mississippi Supreme Court (App. 1a, *infra*), and detailed in the findings of fact of the Chancery Court of Hancock County, Miss. (App. 29a, *infrx*).

At the commencement of this suit in 1978, the title dispute involved some 2400 upland acres of largely undeveloped agricultural land in Hancock County, a county bounded on the south by the Mississippi Gulf Coast. These lands either border upon or are traversed by bayous, streams or ditches in which the ebb and flow of the tide are discernible. In some instances the lands border on tidal waters. In other instances the tidal waters are included within the description of the lands owned; that is, the

original survey lines run straight across the waterways and no mention is made of them in the land descriptions.

For over 150 years, record title to these acres was quietly enjoyed by the private owners thereof, including the petitioners herein and their predecessors in interest. Their titles are traceable back to pre-statehood Spanish land grants, dated April 15, 1813, when the area was still known as Spanish West Florida.[1]

Following a thorough administrative examination of the Spanish land grant claims, Congress expressly recognized the grants "as valid and complete titles, against any claim on the part of the United States, or right derived from the United States." Act of March 3, 1819, 3 Stat. 528, 529; Act of May 8, 1822, 3 Stat. 707; Act of May 28, 1830, 4 Stat. 408. The Mississippi Supreme Court, however, held that these three congressional confirmations of title "are of no force and effect, for such title to these lands as may ever have been held by the United States was effectively and irrevocably granted to the State of Mississippi on the occasion of statehood in 1817." App. 19a-20a, *infra*.

Mississippi never exhibited any interest in these privately held wetlands until the enactment of the Coastal

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[1]The Mississippi Supreme Court adopted the State's suggestion "that no recognition is [to be] accorded titles to lands in Spanish West Florida under Spanish grants after 1783." App. 18a, *infra*. The court offered the following historical justification for that conclusion: "On October 27, 1810, President Madison proclaimed West Florida south of the 31st parallel a part of the Untited States. On February 12, 1812, the Congress authorized the President to take West Florida below the 31st parallel. 3 Stat. 472 (1812). On May 14, 1812, the area with which we are here concerned was formally annexed to the Mississippi Territory. 2 Stat. 734 (1812). Cinque Bambini, et al., claim under Spanish grants said to be dated from April 15, 1813. Such grants came too late." App. 19a, *infra*.

Wetlands Protection Law in 1973. Miss. Code Ann. §49-27-1 through -69 (Supp. 1986). This statute charged the Mississippi Marine Resources Council with the task of preparing maps identifying state-owned wetlands, for regulatory purposes. Section 49-27-5 defined the term "coastal wetlands" to include "all publicly owned lands subject to the ebb and flow of the tide; which are below the watermark of ordinary high tide."

Maps were then drawn from infrared aerial photographs, which purport to show the impact and extent of salt water incursions. The maps were necessarily imprecise and were not drawn for the purpose of indicating legal titles or claims to any of the wetlands; they were drawn solely for the purpose of indicating the probable scope of the state's wetlands. Nonetheless, the Mississippi Mineral Lease Commission began to use the maps as indicating the boundaries of the state-owned public trust wetlands and to sell oil and gas leases on the wetlands thus delineated.

In 1977 the Commission leased some 600 acres of wetlands, the record title to which had long resided with the petitioner Cinque Bambini and others, to the respondent Saga Petroleum U.S., Inc. The leases were recorded in the chancery clerk's office in Hancock County.

Upon learning of these oil leases, Cinque Bambini and other record title holders instituted this suit in 1978 to confirm and remove clouds from their titles. The State of Mississippi and its lessee Saga Petroleum were named as defendants. Answers and counterclaims were filed by the defendants.

After extended proceedings in the Chancery Court of Hancock County, the court entered detailed findings and conclusions. App. 29a-70a, *infra*. The court held that only

about 141 of the 2400 acres claimed by the state are within the state-owned public trust. The court found two categories of tidally-influenced wetlands within those 141 acres: (1) slightly over 98 acres consist of two lakes dredged by a state contractor in the mid-1960s to obtain fill material for the construction of an interstate highway, I-10; and (2) slightly over 42 acres consist of the north branch of Bayou LaCroix and eleven (11) small drainage streams ranging in size from .44 acres to 9.966 acres (the total surface area for six of these streams being less than one acre each).

B. The Mississippi Supreme Court ruling

On the appeal by the private claimants, the Mississippi Supreme Court affirmed the Chancery Court's ruling in part and reversed in part. Specifically, the Supreme Court held:

(1) The two artificially created lake tidelands do not belong to the state inasmuch as the beds beneath the waters were not tidelands in 1817, the year of statehood. To strip those wetlands from the private record title holders would constitute an uncompensated taking in violation of both the federal and state constitutions. App. 23a-24a, *infra*.

(2) The remaining 42 acres covered by the north branch of Bayou LaCroix and the eleven drainage streams, being tidally influenced in 1817 even though non-navigable, are within the public trust of Mississippi. See App. 2a, 15a, *infra*. Such lands were effectively and irrevocably granted to the state on the occasion of statehood in 1817. The Supreme Court accordingly remanded the proceeding to the Chancery Court to establish more precise outer boundaries of these public trust wetlands. App. 26a, *infra*.

In so ruling, the Mississippi Supreme Court addressed and relied upon what it conceived to be the decisive point of federal law[2] – "whether at the time of statehood tidally influenced non-navigable waters were included in the state owned public trust." App. 9a, *infra*. The court acknowledged that all parties before it had addressed that federal question. The private claimants, said the court, had argued that, while early federal cases had referred to public trust land as including all lands within the "ebb and flow of the tide," subsequent decisions of this Court, beginning with *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367 (1842), had translated the "ebb and flow" concept into a "navigable waters" concept. According to this argument, the state owned public trust included "only those waters navigable in fact in 1817, tidal influence being essentially irrelevant." App. 8a, *infra*. The State, on the other hand, argued that, "in addition to such navigable waters, the trust also includes all lands subject to the ebb and flow of the tide in 1817 and below the then mean high water mark." App. 8a-9a, *infra*.

The Mississippi court could find "no federal case expressly deciding this point of federal law." App. 9a, *infra*. It accordingly fashioned its own principle that, "as a matter of federal law, the United States granted to this State in 1817 all lands subject to the ebb and flow of the tide and up to the then mean high water level, without regard to navigability." App. 10a, *infra*. In the course of marking the public trust boundaries by the tidal high water mark, the

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[2]The court stated that "the question of what lands are given to the State in trust is necessarily a question of federal law." App. 7a-8a, *infra*. See *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 22 (1935); *California ex rel. State Lands Comm'n* v. *United States*, 457 U.S. 273, 286 n. 14 (1982).

court referred to the physical fact that even navigable streams and channels contain some non-navigable parts, particularly near the shorelines. So, for purposes of dealing with tidally influenced waters, the court tried to equate the navigability-in-fact test with the ebb-and-flow test by creating a novel "toothpick" test, i.e.,

> ". . . so long as by unbroken water course — when the level of the water is at mean high water mark — one may hoist a sail upon a toothpick and without interruption navigate from the navigable channel/area to land, always afloat, the waters traversed and the lands beneath them are within the inland boundaries we consider the United States set for the properties granted the State in trust." App. 12a, *infra*.

The court concluded that the 42 acres covered by the north branch of Bayou LaCroix and the eleven drainage streams, being non-navigable except by a toothpick propelled by the tide, were part of the public trust conveyed by the United States to Mississippi in 1817. The fee simple titles stemming from the Spanish land grants and from the confirming Acts of Congess were thus held to be without force or effect. And the State is now free to execute oil, gas and mineral leases to various oil companies, such as the respondent Saga Petroleum, covering water bottoms which are also claimed by the upland owners.

REASONS FOR GRANTING THE WRIT

1. The decision below raises an equal footing problem of importance to all states

The decision of the Mississippi Supreme Court poses a unique problem of signal importance to "the constitutional rule of equality among the States whereby each new

State becomes, as was each of the original States, the owner of the soil underlying the navigable waters within its borders." *Oklahoma* v. *Texas*, 258 U.S. 574, 583 (1922).

Does that constitutional rule, known as the equal footing doctrine, permit a coastal state like Mississippi to acquire a "more-than-equal" footing as of the time of statehood? The decision below appears to give an affirmative answer. Until now equality in footing has been achieved by recognizing that all states upon admission acquire a public trust "ownership of land under navigable waters [as] an incident of sovereignty." *Montana* v. *United States*, 450 U.S. 544, 551 (1981). A similar trust dominionship of land under non-navigable but tidally affected waters has not been recognized, at least by this Court.

To that extent, the Mississippi decision – particularly if left unreviewed – will create an imbalance in the equal footing doctrine, an imbalance that favors coastal states with tidally influenced non-navigable waters. Whereas the coastal states will possess trust dominion as to non-navigable tidewaters, the inland states will continue to possess no dominion whatever as to the lands submerged under non-navigable freshwaters that are not tidally influenced. The Mississippi court described this imbalance as a "logical incongruity" that may have "no reasoned basis" but ascribed the "well settled" imbalance to decisions of this Court. App. 16a, *infra*. Yet, in another part of its opinion, the Mississippi court claimed that "we find no federal case expressly deciding this point of federal law." App. 9a, *infra*. This Court should now clarify and rectify the Mississippi court's confusing application of the equal footing doctrine and the resulting doctrinal extension favoring coastal states.

On numerous occasions this Court has deemed efforts to limit the scope of the state owned public trust land of

such extraordinary importance as to warrant plenary consideration. In *Pollard's Lessee* v. *Hagan,* 44 U.S. (3 How.) 212, 220 (1845), for example, the Court approached the problem whether the United States could retain any municipal sovereignty, jurisdiction or right over the soil beneath navigable waters, conveyed to Alabama at statehood, "with a just sense of its great importance to all the states of the union, and particularly to the new ones." Justice Catron's dissent deemed the matter "the most important controversy ever brought before this court, either as it respects the amount of property involved, or the principles on which the present judgment proceeds." *Id.*, at 235.[3]

Much the same sense of constitutional importance presumably underlies the recent grant of certiorari in *Utah* v. *United States,* No. 85-1772, 55 U.S.Law Week 3257 (Oct. 14, 1986). That case presents another facet of the public trust doctrine, this time involving a navigable freshwater lake in Utah. More precisely, the issue is whether a pre-statehood federal law, reserving federal title to Utah Lake for reservoir purposes, defeats Utah's entitlement to the bed of the lake under the equal footing doctrine.

Note should be made of the denial of certiorari in No. 80-432, *City of Newark* v. *Natural Resource Council,* 449 U.S. 983 (1980), a case implicating state ownership of the New Jersey marshlands. The New Jersey Supreme Court's opinion asserted that this Court had never rejected the tidal ebb and flow standard as the basis for sovereign ownership of land beneath tidally-flowed, but non-navigable waters. 82 N.J. 530, 543-44, 414 A.2d 1304, 1310-11

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[3]Both the sentiments of the majority opinion in *Pollard's Lessee* and the remarks in Justice Catron's dissent were quoted with approval in *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 373 (1977).

(1980).[4] The state attorney general opposed the grant of certiorari, arguing that the standard for sovereign ownership of the marshlands was a purely collateral and unnecessary issue, since the case merely involved a question whether administrative maps of the marshlands had been properly prepared as required by statute. This may explain the denial of certiorari. Moreover, since New Jersey is one of the original thirteen states, there was no federal issue arising under the equal footing doctrine.

In sum, it is clear that this Court has never resolved the constitutional propriety of extending the public trust doctrine to the non-navigable but tidally influenced wetlands of coastal states. As the ultimate arbiter of the public trust and the equal footing doctrines, the Court should grant certiorari in this case.

2. The "toothpick navigability" test created by the court below conflicts with this Court's historic "navigability-in-fact" test

The opinion below creates a novel and dubious "toothpick" test of navigability for defining public trust boundaries of otherwise non-navigable but tidally influenced wetlands. Such a test confounds both history and geophysics. Furthermore, it conflicts with the repeated decisions of this Court that the wetlands to which the states acquire public trust dominion are those beneath *navigable* waters, tidal or fresh. See *Martin* v. *Waddell,* 41

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[4]The statements in the *Newark* opinion of the New Jersey Supreme Court with reference to sovereign ownership based on tidal flow, irrespective of navigability, were cross-reference summaries of the seminal New Jersey decision declaring such ownership to be the rule in New Jersey. *O'Neill* v. *State Highway Dept.*, 50 N.J. 307, 235 A.2d 1 (1967). Certiorari was not sought in the *O'Neill* case, possibly because it rested on state law grounds.

U.S. (16 Pet.) 367, 410 (1842) (navigable ebb and flow tidewaters); *Montana* v. *United States,* 450 U.S. 544, 551 (1981) (navigable freshwater river); *Illinois Central Railroad* v. *Illinois,* 146 U.S. 387, 452 (1892) (navigable Lake Michigan).

The absence of any decision of this Court extending the public trust doctrine to non-navigable waters, whether by use of a toothpick analogy or otherwise, is quite understandable. Navigability has always been the touchstone of this Court's treatment of the public trust doctrine, and rightly so. The one common denominator that creates equality of footing in state public trust dominion over wetlands, in both coastal and inland states, is navigability. Navigability in this context, moreover, has always been held to mean "navigability in fact." *McGilvra* v. *Ross,* 215 U.S. 70, 78 (1909) ("navigable waters" means "waters which [are] navigable in fact"); *Oklahoma* v. *Texas,* 258 U.S. 574, 586 (1922) ("the settled rule in this country [is] that navigability in fact is the test of navigability in law"). What is navigable in fact turns not upon the navigability of a toothpick under sail but upon whether, in the words of the *Oklahoma* decision, *id.,* the water

> ". . . is used, or is susceptible of being used, in its natural and ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

Only if navigability in fact means susceptibility to use as "a highway for commerce" in trade and travel can one of the constitutional concerns underlying the public trust doctrine be respected, i.e., that the wetlands that are conveyed to the states as a public trust must be deemed subject to the paramount power of Congress to regulate the com-

merce and navigation on such waters. *Scott* v. *Lattig,* 227 U.S. 229, 242-243 (1913). Congress has no such superior commerce easement or concern as to waters that are in fact commercially non-navigable, whether or not they are affected by the ebb and flow of the tide. Nor is there any overriding public interest in preserving non-navigable waters, even of the tidally influenced variety, for such public uses as navigation, swimming or fishing; nor is there any correlative public interest in protecting such waters "from private interruption and encroachment," *Illinois Central Railroad* v. *Illinois,* 146 U.S. 387, 436 (1892).

Indeed, the Mississippi court's assertion of public trust dominion over tidally influenced but non-navigable wetlands appears to be in direct conflict with *Shively* v. *Bowlby,* 152 U.S. 1 (1894), where where a similar contention was rejected. In later summarizing the *Shively* ruling, this Court wrote in *McGilvra* v. *Ross,* 215 U.S. at 78:

> "It is enough to say that the [ebb and flow] test of navigability of waters insisted on has had no place in American jurisprudence since the decision in the case of *The Propeller Genesee Chief* v. *Fitzhugh,* 12 How. 443, and is therefore no test of riparian ownership. This is the effect of *Shively* v. *Bowlby,* 152 U.S., *supra.* The whole doctrine is there displayed, and the court declared (152 U.S., p. 11) that on account of the 'diversity of view as to the scope and effect of the previous decisions of this court upon the subject of public and private rights in lands below high-water mark of navigable waters,' it appeared 'to be a fit occasion for a full review of those decisions and a consideration of other authorities upon the subject.' And the term 'navigable wa-

> ters,' as there used, meant waters which were navigable in fact. The definition was not inadvertent or unnecessary. It was that to which the reasoning conducted and which became the test of the dominion of the national and state governments over shore lands and the rights which they had or could convey."

The court below refused to apply the *Shively* "navigability-in-fact" test, claiming that it reflects a post-1817 "complete redefinition" of the public trust doctrine that "has the effect of removing from the Mississippi public trust ["ebb and flow"] properties once within it." App. 9a, *infra*. That ruling, itself worthy of this Court's attention, is questionable from practical and historical standpoints, as well as lacking any definitive support in this Court's rulings.

First, the Mississippi court suggests (App. 10a, *infra*) that because a navigable stream like the Mississippi River contains some non-navigable parts, such as the shallow areas near the riverbank, navigability-in-fact cannot be the sole test for determining the public trust nature of purely non-navigable tidal waters.[5] That suggestion misconceives the thrust of the navigability-in-fact test. That test is directed at the navigability of the mainstream of the water course. If that mainstream is navigable, the river is no less navigable because water near the riverbanks is shallower than the mainstream. Practically speaking, such a navi-

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[5]In support of that suggestion, the Mississippi court cites (App. 10a, *infra*) *Montana* v. *United States*, 450 U.S. 544, 551 (1981). But the *Montana* opinion merely states: "Though the owners of land riparian to *nonnavigable* streams may own the adjacent riverbed, conveyance by the United States of land riparian to a *navigable* river carries no interest in the riverbed."

gable river is quite different from a bayou or stream no part of which is navigable in fact.

Second, the Mississippi court revives (App. 8a-9a, *infra*) a long-discredited notion that the public trust doctrine, which America inherited from England, has always – and particularly in 1817 – encompassed "tidewaters" or lands that are subject to the "ebb and flow of the tide," all without regard to navigability. This Court long ago rejected that historical misconception. Chief Justice Taney, writing for the Court in *The Propeller Genesee Chief* v. *Fitzhugh,* 53 U.S. (12 How.) 443, 454-455 (1851), demonstrated that in England, where all navigable rivers are tidally influenced, "tidewaters" and "navigable waters" were synonymous terms. But the doctrine that the crown had dominion over and ownership of lands under tidewaters was founded not "upon the existence of the tide over the lands, but upon the fact that the waters are navigable." *Illinois Central Railroad* v. *Illinois,* 146 U.S. 387, 436 (1892), relying on *Genesee Chief, supra.*

While some early American cases continued to use the terms synonymously in the English tradition, the fact that many navigable waters in this country are not tidally influenced (and vice versa) rendered tidal ebb and flow useless either as (1) a synonym of navigability or (2) an alternative description of submerged public trust lands. What emerged in this country was the essence of the common law public trust doctrine, i.e., state dominion of the lands under navigable waters. See, e.g., *Pollard's Lessee* v. *Hagan,* 44 U.S. (3 How.) 212, 225 (1845); *Martin* v. *Waddell,* 41 U.S. (16 Pet.) 367, 410 (1842); *Barney* v. *Keokuk,* 94 U.S. 324, 338 (1876); *Shively* v. *Bowlby,* 152 U.S. 1, 57-58 (1894); *McGilvra* v. *Ross,* 215 U.S. 70, 78 (1909); *Illinois Central Railroad* v. *Illinois, supra.*

In virtually every decision of this Court dealing with the public trust doctrine, particularly in the context of the admission of states on an equal footing, the Court has referred to the state-owned trust in terms of the "navigable tidewaters," *United States* v. *California,* 332 U.S. 19, 30 (1947), or "lands beneath navigable waters," *Bonelli Cattle Co.* v. *Arizona,* 414 U.S. 313, 318, 321-324 (1973), or "ownership of land udner navigable waters," *Montana* v. *United States,* 450 U.S. 544, 551 (1981).[6] See also the Submerged Lands Act provision confirming state "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States." 43 U.S.C. §1311(a).

In the conceded absence of binding precedent in this Court recognizing, as of 1817 or any other time, state public trust ownership over non-navigable tidewaters, the "toothpick" decision of the Mississippi Supreme Court is in conflict with all the foregoing decisions of this Court that limit ownership to lands submerged under waters that are navigable in fact.

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[6]In *Utah* v. *United States,* No. 85-1772, now pending before the Court for decision, the Attorney General of Mississippi joined the attorneys general of 29 other states in an *amici curiae* brief supporting Utah's petition for certiorari. That brief states (at p. 5) that "This Court repeatedly has recognized that the several states own the beds of navigable waterbodies as an inherent attribute of state sovereignty." The opposition brief of the Solicitor General of the United States also describes (at p. 6) one aspect of the equal footing doctrine to be "that a newly admitted state in general has the same right as the original states to lands beneath navigable waters."

3. Implementation of the decision below has a devastating impact on private landholdings in Mississippi

The Mississippi Supreme Court concedes that there are "great public interests and neither insignificant nor illegitimate private interests" at stake in this proceeding. App. 1a, *infra*. The court further acknowledges that extension of the "toothpick" doctrine to non-navigable tidally influenced waters "is of enormous importance to the Mississippi Gulf Coast." App. 9a, *infra*.

The "enormous importance" of this problem is partially reflected in the severe impact of the decision below on the land rights of those Mississippians whose titles and leasehold interests respecting non-navigable streams on their property have been considered settled for over 150 years. The decision below threatens thousands of residential and commercial owners and users of the upland wetlands of Mississippi, throwing their rights into confusion and implicating the concerns of title insurance companies, lenders, tax authorities, and the like.

Multitudes of expensive and prolonged land title lawsuits will likely be spawned by the decision below. Already the instant dispute over some 2400 acres has occupied nearly 10 years of the time and energies of courts, counsel and litigants, at the cost of more than a million dollars in hiring expert witnesses, taking depositions, surveying the wetlands in question, and incurring attorney fees. The end is not yet in sight, for the case is to be returned to the trial court to determine more precisely the wetland boundaries as of 1817 – a difficult and expensive geophysical feat in and of itself.

Mississippi may well suffer the fate of New Jersey. Following a 1960 state court decision retroactively asserting

public trust dominion over 244,000 acres of non-navigable marshlands in New Jersey, the rights of between 50,000 and 60,000 individual property owners were cast into confusion. State courts were inundated with title disputes as the boundaries of the dominion were litigated on a case-by-case basis. See Porro and Teleky, *Marshland Title Dilemma: A Tidal Phenomenon,* 3 Seton Hall L. Rev. 323 (1972); Note, *Tideland Ownership — Time to Reform,* 36 U. Cinn. L. Rev. 121 (1967). Likewise, in California, state court decisions asserting retroactive state title to coastal tidelands have thrown into "confusion and disarray previously secure titles and investors' expectations." Jampol, *The Questionable Renaissance of the Tidelands Trust Doctrine in California,* 13 Southwestern U. L. Rev. 1, 82 (1982).

It is unfortunate that Mississippi, in its desire to exploit mineral resources, has seen fit to resort to a dubious "toothpick" theory of state public trust title, and to assert such title on a retroactive basis going back more than 150 years. Mississippi's belated public trust claim implicates the constitutional rights of the record title holders not to have their property taken for public use without just compensation.

The historical and precedential footings of this retroactive claim are highly questionable, and certainly deserving of review by this Court.

CONCLUSION

For all the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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November 28, 1986

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

NO. 55,306

CINQUE BAMBINI PARTNERSHIP, CARROLL W. ALLEN, LYDIA CARROLL, HAMILTON ALLEN, HARRY B. KELLEHER, SPOONER PETROLEUM COMPANY, AND ENSERCH EXPLORATION, INC. AND PHILLIPS PETROLEUM COMPANY

V.

STATE OF MISSISSIPPI AND SAGA PETROLEUM U.S., INC.

EN BANC [May 14, 1986, as modified on rehearing, July 30, 1986]

ROBERTSON, JUSTICE, FOR THE COURT:

I.

Though great public interests and neither insignificant nor illegitimate private interests are present and in conflict, this in the end is a title suit. Plaintiffs, Cinque Bambini Partnership and others ("Cinque Bambini"), have brought an action to confirm title and remove clouds from title to 2400 acres of largely undeveloped property in Hancock County near the Mississippi Gulf Coast. As the lands are arguably tidelands, the State of Mississippi claims title in its capacity as trustee of the federally created public trust, vintage 1817, the year of statehood.

Accepting the State's view of the geographical contours of the public trust, the Chancery Court of Hancock County ruled that the State owns 140.863 of the 2400 acres Cin-

que Bambini claims. Ninety-eight of the 140 plus acres consist of two lakes that were dredged by the State's general contractor in the mid-1960s to obtain fill material for construction of Interstate Highway I-10. The remaining forty-two plus acres consist of the north branch of Bayou LaCroix and eleven small drainage streams ranging in size from .44 acres to 9.966 acres. The total surface area for six of the streams is less than one acre each.

The private landowners, Cinque Bambini, et al, claiming under Spanish grants purportedly confirmed by the Congress of the United States, have appealed arguing, inter alia, that the Chancery Court erred in the definition of the geographical contours of the public trust.

For the reasons explained below, we hold that fee simple title to all lands naturally subject to tidal influence, inland to today's mean high water mark, is held by the State of Mississippi in trust. On the other hand, lands brought within the ebb and flow of the tide by avulsion or by artificial or non-natural means are owned by their private record titleholders. We affirm in part and reverse in part.

II.

There are no material disputes in the facts. Cinque Bambini and others are vested with record title, derived from pre-statehood Spanish land grants said to date back to April 15, 1813 and to have been expressly confirmed by Acts of the Congress, and from federal and state patents. This avails Cinque Bambini nothing, however, if the lands in dispute are a part of those held by the State of Mississippi by virtue of a trust created at the time Mississippi was admitted to the Union in 1817. For all practical purposes, the case turns on whether the disputed lands are a part of the public trust.

The present dispute seems to have its genesis in the Coastal Wetlands Protection Law enacted by the Mississippi Legislature in 1973. Miss. Code Ann. §49-27-1 thru -69 (Supp.1985). This law charged the Mississippi Marine Resources Council (MMRC) with preparing maps identifying the state-owned wetlands. These maps were made by state employees who "eyeballed" aerial photographs to determine the boundaries of the wetland areas. The purpose of these maps was to provide a method whereby the MMRC could determine whether any given event was occurring on land in its jurisdiction – that is, in a wetlands area. These wetland maps were recorded in the office of each chancery clerk in the three coastal counties.

Notwithstanding these beginnings, the issue of the day, pragmatically speaking, appear to be, who will enjoy the revenues from anticipated oil and gas exploration. Contrary to instructions from the MMRC – who warned that the maps were inaccurate and for jurisdictional purposes only – the Mississippi Mineral Lease Commission used these wetland maps to delineate the state-owned land upon which it would then sell oil and gas leases. In following this practice, the Lease Commission leased 600 acres of land – record title to which resided in Cinque Bambini, et al – to Saga Petroleum U.S., Inc. in 1977. These leases were recorded in the Office of the Chancery Clerk for Hancock County, Mississippi.

When Cinque Bambini, et al, learned of these oil leases, they brought suit to confirm and remove clouds from their title. The State of Mississippi answered and counterclaimed. From an adverse ruling regarding the geographical contours of the public trust, Cinque Bambini and the other private landowners appeal.

III.

Prior to Mississippi's statehood, title to all property within what became this state's geographical confines was vested in the federal sovereign, the United States of America, subject to exception to be explained in Section V below. This included all surface waters, as well as the lands and beds of those waters and streams.

At the time of statehood, the United States created two great public trusts and conveyed to each new state, including the State of Mississippi, lands to be held by the state for the public purpose. The first of these was the familiar school lands trust into which the sixteenth section from each township has been placed. *Turney v. Marion County Board of Education*, 481 So.2d 770, 776-77, 783-84 (Miss.1985). The second trust, the one with which we are concerned today, had placed within it the tidelands and navigable waters of the state together with the beds and lands underneath same. *See State ex rel. Rice v. Stewart*, 184 Miss. 202, 234, 184 So. 44, 51 (1938). In each instance the federal sovereign, in recognition of public concerns which seem to override mere private interests, granted to the state fee simple title in certain properties to be held by the state for the benefit of all its people.[1]

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[1]Much scholarly commentary regarding the nature, scope and history of the public trust has been published in recent years. *See, e.g.*, Sax, *The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention*, 68 Mich.L.Rev. 473 (1970); Sax, *Liberating The Public Trust Doctrine From Its Historical Shackles*, 14 U.C.Davis L.Rev. 185 (1980); Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes The People's Environmental Right*, 14 U.C. Davis L.Rev. 195 (1980); and Note, *The Public Trust In Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 Yale L.J. 762 (1970). An excellent discussion of the mapping of coastal boundaries is found in Maloney, et al, *The Use And Significance Of The Mean High Water Line In Coastal Boundary Mapping*, 53 No.Car.L.Rev.

The public purposes to which these lands and waters placed in the public trust may be devoted are not static. Over the years those purposes have come to include navigation and transportation, *Rouse v. Saucier's Heirs,* 166 Miss. 704, 146 So. 291 (1933); *Martin v. O'Brien,* 34 Miss. 21 (1857); commerce, *Rouse v. Saucier's Heirs,* 166 Miss. 704, 146 So. 291 (1933); fishing, *State ex rel. Rice v. Stewart,* 184 Miss. 202, 231, 184 So. 44, 50 (1938); bathing, swimming and other recreational activities, *Treuting v. Bridge and Park Commission of City of Biloxi,* 199 So.2d 627, 632-33 (Miss.1967); development of mineral resources, *Treuting v. Bridge and Park Commission of City of Biloxi,* 199 So.2d 627, 633 (Miss.1967); environmental protection and preservation, Miss. Code Ann. §§49-27-3 and -5(a) (Supp.1985); the enhancement of aquatic, avarian and marine life, sea agriculture and no doubt others. *See Marks v. Whitney,* 6 Cal.3d 251, 491 P.2d 374, 98 Cal.Rptr. 790 (1971). Suffice it to say that the purposes of the trust have evolved with the needs and sensitivities of the people — and the capacity of trust properties through proper stewardship to serve those needs.

All of this came about as an outgrowth of federal implementation of the familiar equal footing doctrine. *See e.g., Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.,* 429 U.S. 363, 370-78, 97 S.Ct. 582, 50 L.Ed.2d 550, 558-63 (1977); *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845). The original

185 (1974). Trouble spots are discussed in Porro, et al, *Marshland Title Dilemma: A Tidal Phenomenon,* 3 Seton Hall L.Rev. 323 (1972). An articulate voice in dissent appears in Jampol, *The Questionable Renaissance Of The Tidelands Trust Doctrine In California,* 13 Southwestern U.L.Rev. 1 (1982). Nothing said here should be taken as endorsement of the views expressed in any of these articles. Collectively, they provide a valuable context for understanding the public trust doctrine and its importance, yesterday and today.

states withheld their tidelands and navigable waters from the United States at the time of adoption of the Constitution. Those lands and waters so reserved by the states were held in trust for the public benefit. *See, e.g., Arnold v. Mundy,* 6 N.J.L. 1 (1821). Thereafter, each new state was admitted to the Union on an equal footing with the original thirteen, *viz.* as each one of the thirteen held its tidelands and navigable waters in public trust the United States created like trusts in each new state.[2] *Montana v. United States,* 450 U.S. 544, 551, 101 S.Ct. 1245, 67 L.Ed.2d 493, 501 (1981). The point for the moment is that once Mississippi had been admitted to the Union and once the public trust had been created and funded, the role of the equal footing policy ended and title to the lands conveyed in trusts became vested in the state, subject, of course, to the trust. *See Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 376, 97 S.Ct. 582, 590, 50 LEd.2d 550, 562 (1977); *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892).

Federal law recognizes state authority over trust properties as plenary;[3] once the trust was funded, so to

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[2]The Act of March 1, 1817, authorizing the formation of the State of Mississippi provided that the new state should

> be admitted into the Union upon the same footing with the original states in all respects whatever.

3 Stat. 472, 473 (1817).
The conditions of the March, 1817, enactment having been met, the Congress of the United States on December 10, 1817 formally admitted Mississippi

> into the Union on an equal footing with the original states, in all respects whatever.

[3]Though not relevant here, the State's interests in the trust property have remained subject to "the paramount power" of the United States to regulate navigability pursuant to commerce clause. *Montana v. United States,* 450 U.S. 544, 551-52, 101 S.Ct. 1245, 67 L.Ed.2d 493, 501-02 (1981); *Oregon ex rel. State Land Board v. Corvallis Sand &*

speak, the federal role was spent. *Oregon ex. rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 371, 376, 97 S.Ct. 582, 50 L.Ed.2d 550, 558, 562 (1977). State law in turn prohibits disposition or use of trust property except in furtherance of the public purpose. *International Paper Co. v. Mississippi State Highway Dept.*, 271 So.2d 395, 399 (Miss.1972); *Treuting v. Bridge and Park Commission of City of Biloxi*, 199 So.2d 627, 633 (Miss.1967); *Money v. Wood*, 152 Miss. 17, 118 So. 357 (1928). The Attorney General repeatedly and correctly states in his brief that the State may not convey fee simple title to properties so held in trust "unless it is for a higher public purpose and then only by legislative enactment". (Brief for Appellees and Cross-Appellant, filed April 18, 1984, at pp.8, 16). *See Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 452-54, 13 S.Ct. 110, 36 L.Ed. 1018, 1042 (1892); *Priewe v. Wisconsin State Land & Improvement Co.*, 93 Wis. 534, 67 N.W. 918 (1896) aff'd on reh., 103 Wis. 537, 79 N.W. 780 (1899).

IV.

A.

We are concerned fundamentally with the inland reach of the trust boundaries, with identification, geographically and topographically, of the lands held by the State of Mississippi in trust *today*. The initial step in that identification process requires that we ascertain exactly what properties were granted to the State in trust in 1817. As the federal settlor held title to all lands prior to statehood and the creation of the trust, and as it was that same federal settlor which determined under the equal footing doctrine which lands it would grant to the State and which it would re-

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Gravel Co., 429 U.S. 363, 375-76, 97 S.Ct. 582, 50 L.Ed.2d 550, 501 (1977); *Rouse v. Saucier's Heirs*, 166 Miss. 704, 713, 146 So. 291, 292 (1933).

serve for patent to private citizens, the question of what lands were given to the State in trust is necessarily a question of federal law. *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, 22, 56 S.Ct. 23, 29, 80 L.Ed. 9, 17 (1935); *California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 285 n.14, 102 S.Ct. 2432, 2440 n.14, 73 L.Ed.2d 1, 12 n.14 (1982); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 373, 97 S.Ct. 582, 588, 50 L.Ed.2d 550, 562 (1977).

What then are the federal principles by which we may establish on-the-ground surveyable boundaries of the properties granted the State of Mississippi in trust in the year 1817? We regard as settled the proposition that, insofar as federal law is concerned, the identity of properties granted by the United States in trust became fixed at the time of statehood. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 376, 97 S.Ct. 582, 590, 50 L.Ed.2d 550, 562 (1977); *United States v. Utah*, 283 U.S. 64, 75, 51 S.Ct. 438, 440-41, 75 L.Ed. 844, 849 (1931); *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471, 477, 13 L.Ed. 220, 223 (1850).

The early federal cases refer to the trust as including all lands within the ebb and flow of the tide. Cinque Bambini argues, nevertheless, that "ebb and flow of the tide" should be translated "navigable waters" and cites several admiralty jurisdiction cases beginning with *The Genessee Chief*, 53 U.S. (12 How.) 443, 13 L.Ed. 1058 (1851). Cinque Bambini's position is that the surveyable boundaries of trust properties were redefined in a series of cases beginning with *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 10 L.Ed. 997 (1842) to include only those waters navigable in fact in 1817, tidal influence being essentially irrelevant. The State's position is that, in addition to such navigable

waters, the trust also includes all lands subject to the ebb and flow of the tide in 1817 and below the then mean high water mark. Resolution of this issue is outcome determinative of much of this case – and, apparently, is of enormous importance to the Mississippi Gulf Coast. We proceed with some temerity as we find no federal case expressly deciding this point of federal law – whether at the time of statehood tidally influenced non-navigable waters were included in the state owned public trust.

The evolution of the so-called redefinition of the trust suggests a clue or two. Originally, "tidewaters," "ebb and flow of the tide," and similar language dominated discussions of the trust. It soon became apparent, however, that many of the new states had no coastline and hence had no lands within the ebb and flow of the tide. If the equal footing doctrine was to have meaning in those inland states, something had to be done to the theretofore restrictive delineation of the trust lands. Following the comparable expansion of admiralty jurisdiction in *The Genessee Chief*, the Supreme Court expanded the definition of the trust to include all navigable freshwaters. *See, e.g., McGilvra v. Ross*, 215 U.S. 70, 30 S.Ct. 27, 54 L.Ed. 95 (1909); *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894), and more recently *Montana v. United States*, 450 U.S. 544, 551, 101 S.Ct. 1245, 67 L.Ed.2d 493, 501 (1981) and *Utah v. United States*, 403 U.S. 9, 91 S.Ct. 1775, 29 L.Ed.2d 279 (1971). The question posed by these and many like cases is whether the advent of the navigable waters test is, on the one hand, a complete redefinition of the geographical scope of the trust or, on the other hand, a mere addition to the tidelands/tidewaters trust applicable only in the case of non-tidally influenced freshwaters. Put another way, did the navigable waters test have the effect of removing from the Mississippi public trust properties once within it?

It is our view that, as a matter of federal law, the United States granted to this State in 1817 all lands subject to the ebb and flow of the tide and up to the then mean high water level, without regard to navigability. *See Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387, 435-36, 13 S.Ct. 110, 36 L.Ed. 1018, 1036 (1892); *Money v. Wood,* 152 Miss. 17, 28, 118 So. 357, 359 (1928). The more recent navigable waters test provides the insight which explains why this must be so. Navigable waters – whether the Mississippi River, the Pearl River, the Yazoo River or any other natural waterway in this state navigable in fact – by their very nature contain deeper areas that are navigable and more shallow areas, near the riverbank, up in chutes, over bars and the like, that are not. The State's original title to these waters included the navigable as well as the non-navigable parts. *See Montana v. United States,* 450 U.S. 544, 551, 101 S.Ct. 1245, 1251, 67 L.Ed.2d 493, 501 (1981). The same of tidewaters. The State of Mississippi was granted in trust certain tidelands fronting the Gulf of Mexico, extending inland up to the 1817 mean high water mark. Some of those areas were at the time navigable in fact and some were not. But the Gulf of Mexico as a whole – even only to the outer limits of Mississippi's territorial limits – is navigable by anyone's definition. That there may be non-navigable areas held by the State in trust is no more anomalous in the case of tidewaters than freshwaters.

Navigable freshwaters do not always strike the riverbank at the same point. Rivers rise and fall, seasonally and with the rains. A more constant boundary of necessity has been found – the high water mark. The Gulf of Mexico, however, shifts its boundaries far more often – as the tide daily ebbs and flows, or, more precisely, as the waters interact gravitationally with the moon. Established and ac-

cepted scientific methods enable us to establish a mean high water – frequently referred to as mean high tide. *See Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10, 22-27, 56 S.Ct. 23, 80 L.Ed. 9, 18-20 (1935); and *O'Neill v. State Highway Department*, 50 N.J. 307, 235 A.2d 1, 9-10 (1967). That mark is not a line observable on the ground, although it may be plotted by surveyors trained in the field. When plotted we confront the geographical reality of a continuous, unbroken line wildly meandering, to be sure, but reaching from Alabama on the east in uninterrupted sequence to Louisiana on the west. This line is – in theory, at least – ascertainable as of 1817. Federal law recognizes it as the inland boundary of the navigable tidewaters of the State of Mississippi. Fee simple title to all areas south of it was granted to the State in trust.

What emerges is that the legal boundaries of navigable tidewaters are conceptually and functionally the same as those for navigable freshwaters. The high water mark concept is used in both instances. That sophisticated geophysical study by reference to the tidal epoch and the like may customarily be employed in the establishment of mean high tide, while simpler processses are used with navigable rivers, is of no moment. Recognition of the conceptual equivalence of these two approaches to the establishing of certain boundaries for present purposes serves to make clear that the navigable waters test was no new test but the removal of an arbitrary and irrational limitation on the old ebb and flow test. In each instance – freshwaters or tidewaters – the central focus is upon navigable waters, but no one has ever suggested that the boundaries of that granted in trust were the contours of the navigable channel. The boundary of each waterway navigable in fact is that point where mean high water mark (variously determined) strikes land. Within that surveyable, territorial boundary (and outside the navigable channel/area) will

always be some non-navigable areas. Yet so long as by unbroken water course – when the level of the waters is at mean high water mark – one may hoist a sail upon a toothpick and without interruption navigate from the navigable channel/area to land, always afloat, the waters traversed and the lands beneath them are within the inland boundaries we consider the United States set for the properties granted the State in trust.

What was granted the State in trust in 1817 is a function of the positive law of the United States. We are not so much concerned with ascertaining what the federal government intended to grant as with what it did grant. Still, when there is a haze about the contours of what the federal government did grant, it is by no means inappropriate to consider purposes then known as an aid to extrapolation of the geographical boundaries of the grant.

No doubt commerce and navigation were considered vitally important. But fishing and bathing have long coexisted with commerce and navigation as public purposes. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 412-414, 10 L.Ed. 997, 1013 (1842). Waters that are valuable for fishing and bathing purposes often are not navigable in fact – at least not at the point where the fishing and bathing takes place. The point is that exclusion of non-navigable tidewaters from the trust in 1817 would have been inconsistent, if not downright irrational, given then accepted public purposes.

We are reinforced in our view by the fact that the federal cases have continued to use "tide" terminology long after the recognition that non-tidal freshwaters were included in the trust. *See, e.g., Summa Corp. v. California ex rel. State Land Commission*, 466 U.S. 198, 104 S.Ct. 1751, 80 L.Ed. 237, 243 (1984) ("tidelands"); *Borax Con-*

solidated, Ltd. v. City of Los Angeles, 296 U.S. 10, 16, 23, 56 S.Ct. 23, 80 L.Ed. 9, 14, 18 (1935) ("tidelands", "ebb and flow of the tide"); *McGilvra v. Ross*, 215 U.S. 70, 79, 30 S.Ct. 27, 54 L.Ed. 95, 100 (1909). If the navigable waters test had replaced the ebb and flow test, rather than merely extending it to freshwaters, one would have expected the former language to have disappeared. Of course, as explained above, subject to geophysical differences between tidewaters and freshwaters, what has happened in the case of the inland states' public trusts at the time of *The Genessee Chief* and since has been nothing more than a principled extension to freshwaters of the test long employed with tidewaters.

B.

Though we consider here a question of federal law, we may hardly ignore our prior public trust cases. We find those cases consistent with what has been said above. This Court has repeatedly stated its understanding of the geographical scope of the federally created trust as including, at least,

> the soil, and . . . the minerals therein contained, the beds of all its shores, arms and inlets of the sea, wherever the tide ebbs and flows.

State ex rel. Rice v. Stewart, 184 Miss. at 230,184 So. at 49.

Rouse v. Saucier's Heirs, 166 Miss. 704, 146 So. 291 (1933) recognizes the inland extent of the federal grant in trust as including

> title to all land under tidewater, including the spaces between ordinary high and low water marks; . . . .

166 Miss. at 713, 146 So. at 292; *see also International Paper Co. v. Mississippi State Highway Dept.*, 271 So.2d 395, 397-98 (Miss.1973).

Cinque Bambini argue that our cases to date have failed to recognize as within the federal grant any tidal waters which were not navigable in fact. *See State v. Hanson Properties, Inc.*, 371 So.2d 871, 872 (Miss. 1979) (Lowery Island at confluence of Pascagoula River with Mississippi Sound); *H.K. Porter Co., Inc. v. Board of Supervisors of Jackson County*, 324 So.2d 746, 747 (Miss. 1975) (Mississippi Sound Bayou Casotte Ship Channel); *International Paper Co. of Moss Point v. Mississippi State Highway Department*, 271 So.2d 395, 396 (Miss. 1972) (Lowery Island at confluence of Pascagoula River with Mississippi Sound); *Treuting v. Bridge and Park Commission of the City of Biloxi, Mississippi*, 199 So.2d 627, 629 (Miss. 1967) (Mississippi Sound); *Giles v. City of Biloxi*, 237 Miss. 65, 72, 112 So.2d 815, 816 (1959) (Deer Island in Mississippi Sound); *Xidis v. City of Gulfport*, 221 Miss. 79, 83, 72 So.2d 153, 154-55 (1954) (Mississippi Sound); *Crary v. State Highway Commission*, 219 Miss. 284, 287-88, 68 So.2d 468, 469 (1953) (Bay of St. Louis); *State ex rel. Rice v. Stewart*, 184 Miss. 202, 219, 184 So. 44, 45 (1938) (Bayou Bernard, an admitted commercially navigable portion of Biloxi Back Bay); *Rouse v. Saucier's Heirs*, 166 Miss. 704, 711, 146 So. 291, 291 (1933) (Wolfe River, a commercially navigable river flowing into the Bay of St. Louis); *Money v. Wood*, 152 Miss. 17, 25, 118 So. 357, 358 (1928) (Deer Island in Mississippi Sound); *Martin v. O'Brien*, 34 Miss. 21, 27-29 (1857) (Hancock County Beachfront "Seacoast" at town of Shieldsborough). Cinque Bambini overlooks the fact that, from the area of the waters in controversy in each of these cases, our proverbial toothpick sailboat may navigate landward in a generally

northward direction toward the point where mean high water mark intersects with land and, always afloat, cross naturally existing areas comparable to those in controversy here.

That today's case may arguably require that we confront for the first time the State's claim to tidally influenced lands that were not navigable in fact in 1817 need not detain us. Whatever unique facts may appear in the various cases that have heretofore been adjudicated, we have always proceeded upon general principles. Those principles – federal principles – have been repeated too often – here as elsewhere – to admit of serious doubt.

In summary, effective upon statehood on March 1, 1817, we understand federal law to provide that the United States granted to the State of Mississippi in trust all lands, to which the United States then held title, including their mineral and other subsurface resources, subject to the ebb and flow of the tide below the then *mean* high water level – regardless of whether the water courses were commercially navigable at the time of Mississippi's admission into the Union, regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea. Similarly granted were the beds and streams of all non-tidal waters which were navigable in fact in 1817. This act of creation consummated, the federal sovereign rested.

C.

Nothing in *Morgan v. Reading*, 11 Miss. (3 S.&M.) 366 (1844) or *Steamboat Magnolia v. Marshall*, 39 Miss. 109 (1860) is to the contrary. To be sure, shallow, non-navigable freshwater streams and the beds beneath same are under our law susceptible of private ownership. Neither federal nor state law has ever held such areas in-

alienable from the public trust. This premise, however, has never been held, directly or by implication, to exclude tidally influenced, non-navigable streams from the public trust.

What Cinque Bambini, et al, have identified here is not support for their claims but a logical incongruity in our law. It may well be that there is no reasoned basis for including small, non-navigable tidewaters within the trust while non-navigable freshwaters are without. That the distinction may not be well reasoned, however, does not keep it from being well settled.

A similar logical incongruity appears in the treatment of the beds of navigable freshwaters as distinguished from the beds of tidewaters. Thanks to the redefinition work done in *Shively v. Bowlby,* 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894); *McGilvra v. Ross,* 215 U.S. 70, 30 S.Ct. 27, 54 L.Ed. 95 (1909); and other similar cases – brought about by the application of the equal footing doctrine to new, interior states having no tidewaters, navigable freshwaters are held by the states in trust. This is true in Mississippi as elsewhere. Yet before anyone perceived that the trust extended to navigable freshwaters, Mississippi had already adopted the common law rule that riparian owners hold the beds of such waters to the center of the stream. *See Morgan v. Reading,* 11 Miss. (3 S.&M.) 366, 399 (1844)[4] This has placed Mississippi's trust in an anomolous position. while the lands below tidewaters may not be alienated except for high public purposes and generally

[4]For an exhaustive consideration of the various approaches other states have taken to the question of riparian owners' rights, *see Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894). The currently authoritative consideration of the role of federal law on this point is *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378-81, 97 S.Ct. 582, 50 L.Ed.2d 550, 563-65 (1977).

freshwaters are susceptible of wholly private ownership.[5] The United States Supreme Court has ducked this anomaly by holding that, after statehood, state law controls practically everything. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 378-81, 97 S.Ct. 582, 50 L.Ed.2d 550, 563-65 (1977); *Barney v. Keokuk*, 94 U.S. 324, 338, 24 L.Ed. 224 (1876).

In the end, rather than affording Cinque Bambini a basis for relief, these anomalies are merely further evidence of the perceptiveness of Holmes' sage observation that the life of the law has been experience, not logic.[6]

V.

A corollary of the federal rule articulated in Section IV above is the invalidity of an interest in trust lands claimed under a federal patent granted *after* the funding of the trust. "An ordinary federal patent purporting to convey tidelands located within a state to a private individual is invalid, . . ." *Summa Corp. v. California ex rel. State Lands Commission*, 466 U.S. 198, 205, 104 S.Ct. 1751, 1756, 80 L.Ed.2d 237, 243 (1984). If the federal patent was granted *before* statehood, it ran afoul the obligation of the United

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[5]This Court recognized the dilemma in *State ex rel. Rice v. Stewart*, 184 Miss. 230, 184 So. 44 (1938)

> We shall not attempt to argue the reasonableness or unreasonableness of the distinction, but shall concern ourselves only with determining whether or not such distinction does in fact [and in law] exist.

184 So. at 47.

[6]In 1882 Holmes first said this in *The Common Law* on page one: "The life of the law has not been logic: it has been experience." Forty years later he repeated the point more metaphorically: ". . . [A] page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L.Ed. 963, 893 (1921).

States to hold such tidelands only in trust for the state. *Borax Co. v. Los Angeles*, 296 U.S. 10, 15-16, 56 S.Ct. 23, 80 L.Ed. 9 (1935). If the federal patent was granted *after* statehood, it was a nullity as it necessarily purported to operate upon interests in real property which, at least insofar as federal law was concerned, had been conveyed to the states in trust – and irrevocably so.

These principles hold only with respect to property fee simple title to which was in the United States at and prior to statehood. If, at the time of acquisition by the United States in its sovereign capacity, property was *already* privately owned, it follows on reason that the title was never in the United States and therefore could not have been held by the United States in trust nor thereafter at statehood granted to the state.

Against this backdrop Cinque Bambini, et al, argue that they hold under Spanish grants dating from April 15, 1813 – four years pre-statehood. These Spanish grants, we are told, had the effect that the United States never acquired title; hence, none could be held for or granted to the State of Mississippi as a part of the public trust. There is precedent for this view in the case of ceded territory where tidelands were, prior to cession, privately owned under grants from Mexico. *See Summa Corp. v. California ex rel. State Lands Commission*, 466 U.S. 198, 204-09, 104 S.Ct. 1751, 1756-58, 80 L.Ed.2d 237, 243-46 (1984); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375, 97 S.Ct. 582, 589, 50 L.Ed.2d 550, 561 (1977); *Knight v. United States Land Association*, 142 U.S. 161, 183, 12 S.Ct. 258, 264, 35 L.Ed. 974, 982 (1891).

We find it suggested, however, that no recognition is accorded titles to lands in Spanish West Florida held under Spanish grants after 1783. *Pollard's Lessee v. Hagan*, 44

U.S. (3 How.) 212, 225, 11 L.Ed. 565, 572 (1845); *Henderson v. Poindexter,* 25 U.S. (12 Wheat.) 530, 535-36, 6 L.Ed. 718, 719-20 (1827). In the latter cited case the Supreme Court concluded

> It follows, that Spanish grants, made after the treaty of peace [September 1783], can have no intrinsic validity, and the holders must depend for their titles on the laws of the United States.

25 U.S. (12 Wheat.) at 535, 6 L.Ed. at 720. *See also, Montgomery v. Ives,* 21 Miss. 161 (1849); and *Doe ex dem. Nevitt v. Beaumont,* 7 Miss. 237 (1842).

All of the cases noted above – *Pollard, Henderson, Montgomery* and *Nevitt* – factually concern lands and waters above 31 degrees North latitude. Concededly, the Spanish claim to West Florida below the 31st parallel was far more legitimate that above it. In our view the same result obtains. On October 27, 1810, President Madison proclaimed West Florida south of the 31st parallel a part of the United States.[7] On February 12, 1812, the Congress authorized the President to take West Florida below the 31st parallel. 3 Stat. 472 (1812). On May 14, 1812, the area with which we are here concerned was formally annexed to the Mississippi Territory. 2 Stat. 734 (1812).

Cinque Bambini, et al, claim under Spanish grants said to be dated from April 15, 1813. Such grants came too late. The acts of Congress of March 3, 1819, May 8, 1822 and May 28, 1830 are of no force and effect, for such title to these lands as may ever have been held by the United States was effectively and irrevocably granted to the State of Mississippi on the occasion of statehood in 1817.

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[7]*See* Abernathy, *The South In The New Nation* 358 (1961); and McLemore, ed., *A History Of Mississippi,* vol. 1, p. 226 (1973), for historical discussions of the annexation of West Florida.

VI.

The extent of the federal grant settled, we know only of the content of the trust in 1817. Waters and the courses they follow and the contours of the lands they adjoin are dynamic, though often imperceptibly so. Properties placed in Mississippi's public trust – tidelands or navigable freshwaters – share this characteristic. This leads to our concern whether the legal boundaries of the trust properties are similarly dynamic.

As explained above, effective upon statehood all tidelands and navigable waters were granted to the state in trust. The trust properties as of that date had distinct surveyable boundaries. The question is whether those boundaries today are the same as those fixed and surveyable – in theory, at least – in 1817. Federal law, it will be recalled, spent its force when the trust was originally funded. As of that moment, in the eyes of federal law, the State became a titleholder in this context like unto any private owner. The trust conditions and purposes subject to which the State then held in no way altered its status from that of a mere titleholder vis-a-vis adjoining or contiguous landowners.

Whether the operation of the forces of nature could thereafter add to or subtract from the properties so held by the State is a matter wholly governed by state law. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977).

Insofar as may be relevant to the case at bar, our law has generally accepted contours. Ordinarily the owner of water bounded lands is entitled to accretions thereto. *H.K. Porter Co., Inc. v. Board of Supervisors of Jackson*

County, 324 So.2d 746, 751 (Miss.1975); *Paepcke v. Kirkman*, 55 F.2d 814, 815 (5th Cir. 1932) (citing Mississippi law); *Anderson-Tully Company v. Franklin*, 307 F.Supp. 539, 542 (N.D.Miss. 1969). These include gradual deposit of alluvial soil upon margin of water or gradual recession of waters, *Harrison County v. Guice*, 244 Miss. 95, 140 So.2d 838 (1962). Accretions may grow and develop adjacent to tidelands or the shores of freshwaters. *See Shively v. Bowlby*, 152 U.S. 1, 35, 14 S.Ct. 548, 561, 38 L.Ed. 331, 344 (1894). With regard to public trust tidelands, our law is settled that title to tracts not in existence at the time of the federal grant but formed subsequently by deposits of silt, soil, etc. from a river, is held by the state. *H.K. Porter Co., Inc. v. Board of Supervisors of Jackson County*, 324 So.2d 746, 751 (Miss.1975); *International Paper Co. v. Mississippi State Highway Dept.*, 271 So.2d 395, 398 (Miss. 1973). The public trust, vintage 1817, may be augmented by accretions and by the natural inland expansion of the tidal influence.

Ordinarily, of course, a private landowner may lose title to lands via reliction as well as gain it via accretion. *Anderson-Tully Co. v. Tingle*, 166 F.2d 224 (5th Cir. 1948) (applying Mississippi law). Our cases suggest that, once held by the state in trust, properties are committed to the public purpose and may be alienated from the state only upon the authority of legislative enactment and then only consistent with the public purposes of the trust. *State of Mississippi v. Hanson Properties, Inc.*, 371 So.2d 871, 873 (Miss.1979); *International Paper Co. v. Mississippi State Highway Dept.*, 271 So.2d 395, 398-99 (Miss.1973); *Treuting v. Bridge and Park Commission of City of Biloxi*, 199 So.2d 627 (Miss.1967). Today's decision does not require that we decide whether the State may lose title to trust lands through reliction and we intimate no opinion

thereon, except again to note that the question is wholly one of state law. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977).

The geophysical tidal experience may enlarge the trust properties. If over decades, epochs or even centuries the tides rise – that is, the mean high water mark rises (and there is reason to believe this has happened and may continue to happen) – the inward reach of the tidal influence expands.[8] More lands are tidally affected. On principle there is no way our law may allow a riparian freshwater title holder the benefit of accretions and deny the owner of tidelands the benefits of the natural inland expansion of the tidal influence. Sufficient unto this day is our holding that, where the forces of nature – gradually and imperceptibly – have operated to expand or enlarge the inland reach of the ebb and flow of the tide, the new tidelands so affected accrete to the trust. Put otherwise, state law decrees that the surveyable outer boundary of the trust in the area here in controversy is *today's* mean high water line,[9] regardless of the absence of a tidal influence in 1817, of how far inland and remote from the sea, and regardless of how shallow or how insignificant the tidal influence, subject only to the exception discussed in Section VII below. *See O'Neill v. State Highway Department*, 50 N.J. 307, 235 A.2d 1, 9-12 (1967).

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[8]*See generally*, Lowenstein, "The Restive Beaches" 88 *Technology Review* 50-57 (1985); Pilkey, et al, "Rising Seas; Shifting Shores", 15 *Oceans* 65-69 (1982).

[9]For a thoughtful consideration of the use of the mean high water line as a coastal boundary, see Maloney, et al, *The Use and Significance Of The Mean High Water Line In Coastal Boundary Mapping*, 53 No.Car.L.Rev. 185, 243-262 (1974).

VII.

By way of contrast to our law regarding accretion and reliction, boundaries and titles are not affected by avulsion. *Nix v. Dickerson*, 81 Miss. 632, 643, 33 So. 490 (1903); *Anderson-Tully Co. v. Franklin*, 307 F.Supp. 539, 541 (N.D.Miss.1969). It is this general principle that generates doubt regarding at least a part of the Chancery Court's decision, that declaring as the property of the state lands theretofore without the surveyable boundaries of the trust but brought within the ebb and flow of the tide by the dredging for fill material used in construction of Interstate Highway I-10.

An avulsion is a change in a boundary body of water so rapid or sudden, or in such a short time, that the change is directly perceptible or measurably visible at the time of its progress. *Sharp v. Leonard*, 195 Miss. 201, 215, 14 So.2d 218, 220 (1943); *Anderson-Tully Company v. Franklin*, 307 F.Supp. 539, 541-42 (N.D.Miss.1969). We perceive no reason on principle for exclusion from this notion of a change of water course boundary artificially induced by the dredging process.

Put more broadly, under the laws of this state neither artificially created water courses, inlets, slips, marinas and the like, nor physical improvements or alterations made thereto, become a part of the public trust, even though they may become tidally affected. Leaving aside claims of navigation, ingress and egress, title to such artificially created "tidelands," and the beds beneath the waters as well, remains in the record titleholder. Only those lands, not tidelands in 1817, which have become such via the natural process of accretion or the general rising or inland expansion of the tide have in law been added to the trust so that title is held by the State.

For an additional reason, the two lakes created by dredging for fill material used in construction of Interstate Highway I-10 (to the extent that each lake was not naturally within the ebb and flow of the tide on the date the dredging commenced) do not belong to the state. The State has not paid for these lands. To strip these artificially created tidelands from their record title holders would constitute a taking within the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 3, §17, Mississippi Constitution of 1890, which at the very least would require that the state pay just compensation. *See Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979).

VIII.

Finally, Cinque Bambini argues that the grants and patents under which they hold are entitled to a presumption of validity. In the alternative, the State should in equity be estopped from challenging same.

The first argument is answered by what has been said above. Grants and patents which as a matter of law could convey nothing – because the properties were already in the public trust – are entitled to no presumption of validity. Even those grants and patents which in other contexts may be presumed valid, e.g., *State v. Stockett*, 249 So.2d 388 (Miss.1971), are subject to gain or loss via accretion or reliction.

In support of its alternative theory, Cinque Bambini have called to our attention no case wherein the State of Mississippi has been held estopped; equitably or otherwise, to assert title to and dominion over properties otherwise within the public trust, and our independent research has revaled no such case. Furthermore, the facts presented

here do not support a claim of equitable estoppel. *See, e.g., Chapman v. Chapman,* 473 So.2d 467 (Miss.1985); *PMZ Oil Co. v. Lucroy,* 449 So.2d 201 (Miss.1948).

Moreover, the State's delay in assertion of dominion over these tidelands does not give rise to an estoppel. The State's title may not be lost via adverse possession, limitations or laches. Miss. Const. Art. 4, §104 (1890); *Gibson v. State Land Commissioner,* 374 So.2d 212, 216-17 (Miss. 1979); *Alexander v. Mayor and Board of Aldermen of City of Natchez,* 219 Miss. 78, 94, 68 So.2d 434, 441 (1953); *O'Neill v. State Highway Department,* 50 N.J. 307, 235 A.2d 1, 10 (1967). Under no circumstances may title held by the State for the public use or benefit be so lost. *City of Bay St. Louis v. Board of Supervisors of Hancock County,* 80 Miss. 364, 371, 32 So. 54 (1902); *Bates v. Aven,* 60 Miss. 955, 960-62 (1883).

IX.

Finally, we consider the State's counterclaim which is presented via cross-appeal. In the court below the State sought to recover from Cinque Bambini the value of dirt removed from the bottom of Bayou Enceinte and its adjacent land area in conjunction with the Highway I-10 construction project. From the Chancery Court's denial of this counterclaim, the State appeals.

To the extent that this dirt or fill material may have come from areas today held outside the public trust — see Section VII above, the counterclaim and cross-appeal, of course, must fail. To the extent that this dirt may have come from properties within the trust, we concur with the Chancery Court that the claim must fail for impossibility of proof.

X.

In the proceedings below much technical data regarding surveying methods and the like was presented and considered. The Chancery Court's comprehensive memorandum of decision and final decree necessarily concluded with the establishment of precise, surveyed boundaries separating the properties held by the State in trust from those owned by Cinque Bambini, et al.

This appeal and the assignments of error we have been tendered, however, address only the broad, general principles which must be settled before permanent surveyed or surveyable boundaries may be established. Above we have discussed and tried to make clear the applicable general principles, and in one important particular we have found the Chancery Court in error.

In simpler cases with less at stake, we would finally decide the matter here, viz, we would affirm in part and reverse in part and render. Establishment on the ground and in the land records of the precise outer boundaries of the public trust properties – today – will necessarily involve an interaction between counsel, surveyors and other experts, and the court, an interaction of an extent and nature more compatible with the institutional structure of the Chancery Court than this Court. Accordingly, so much of the final decree below as may be found inconsistent with what we have said above is vacated and the matter is remanded to the Chancery Court for such further proceedings as may be appropriate.

AFFIRMED IN PART: REVERSED IN PART AND REMANDED.
PATTERSON, C.J.; WALKER, P.J.; ROY NOBLE LEE, P.J.; and HAWKINS, DAN M. LEE, PRATHER, SULLIVAN and ANDERSON, JJ., Concur.

MINUTE BOOK,
SUPREME COURT OF MISSISSIPPI MARCH TERM, 1986

WEDNESDAY, MAY 14, 1986:

CINQUE BAMBINI PARTNERSHIP, CARROLL W. ALLEN, LYDIA CARROLL, HAMILTON ALLEN, HARRY B. KELLEHER, SPOONER PETROLEUM COMPANY, AND ENSERCH EXPLORATION, INC. AND PHILLIPS PETROLEUM COMPANY

#55,306

v.

STATE OF MISSISSIPPI AND SAGA PETROLEUM U.S., INC.

This cause having been submitted on the record from the Chancery Court of Hancock County and this Court having considered the same is of the opinion that there is error therein and doth order that the Decree of said Chancery Court rendered in this cause on the 16th day of September, 1982, be and the same is hereby affirmed in part; reversed in part and remanded, all as fully set out in the opinion of this Court. It is further ordered that the appellees do pay all of the costs of this appeal to be taxed.

PHONE: 601/359-3694
601/359-3695
601/359-3696

From The Office Of:
SUE GORDON
Supreme Court Clerk
P.O. Box 117
3rd Floor, Gartin Bldg.
Jackson, MS 39205

July 30, 1986

TO WHOM IT MAY CONCERN

RE: #55,306 Cinque Bambini, etc. v. State

Pursuant to List of Decisions of this Court rendered this date, the Petition for Rehearing filed in above referenced case was denied; however, the original opinion was modified. Attached is a copy of "modified" page 22 of said opinion. Please see that this copy of page 22 is substituted into the copy of the opinion previously furnished you.

Linda Puckett
for
Sue Gordon, Clerk

APPENDIX B

IN THE CHANCERY COURT OF
HANCOCK COUNTY, MISSISSIPPI

CINQUE BAMBINI PARTNERSHIP, ET AL.	)	
Complainants	)	
VS.	)	
	)	
STATE OF MISSISSIPPI, ET AL.	)	
Defendants	)	#14,178
	)	

FINDINGS AND RULING OF THE COURT

This cause of action arises from bill of complaint to quiet and confirm title and to cancel clouds on title filed on December 5, 1978 by the Cinque Bambini Partnership, Carroll W. Allen, Jr., Lydia Carroll, Hamilton Allen, Harry B. Kelleher, Spooner Petroleum Company and Enserch Exploration, Inc. The defendants are State of Mississippi, Saga Petroleum United States, Inc., Marshall Young Oil Company, Public Service Co. of Oklahoma, Elliott Davis, Barry M. Davis, Lee H. Davis, Sagapool U.S. Inc., Union Oil Company of California, Phillips Petroleum Company, Mississippi Power Company, Hancock County, Mississippi, Wesley Haas, James Travinca, Kent Drawerstreet, Mr. and Mrs. Bouce Woods, Melvin Wainwright, Coast Materials Company, South Central Bell Telephone Co., Mississippi State Highway Commission, and any and all parties who have a claim against the real property described in the bill of complaint – some 2400 acres of land.

Separate answers were filed by the South Central Bell Telephone Company, Mississippi State Highway Commis-

sion, Coast Materials Company, Hancock County, Mississippi Power Co., Union Oil Company of California, Phillips Petroleum Company, State of Mississippi (with affirmative defenses), Saga Petroleum and eight other co-defendants (with affirmative defenses), Fred Olsen, Leon Davis, individually and as co-partner D/B/A Davis Bros. and as trustee of Leon Davis Mineral Trust; Elliott Davis, individually and as co-partner D/B/A Davis Bros.; Lee Davis, individually and as co-partner D/B/A Dabro Enterprises; and Barry Davis, individually and as co-partner D/B/A Dabro Enterprises.

The State of Mississippi and Saga Petroleum U.S., Inc. filed demurrers on February 12, 1979, which were denied by the Court on July 24, 1979. The Court's ruling was appealed to the Supreme Court and was affirmed.

The State filed a cross-bill against the Cinque-Bambini partnership, seeking damages for removal of a large quantity of soil from within the boundaries of the subject real property from the Bayou Enceinte area. The partnership had entered into an agreement for sale of construction material with the T.L. James and Co., Inc. in connection with construction of Interstate 10 Highway. Said T.L. James Co. had been employed as general contractor for the work by the Mississippi State Highway Commission. The complainants filed a motion to dismiss or abate the State's cross-bill on April 10, 1981, and the Court sustained the motion to abate. A general demurrer to the cross-bill was also filed on April 10, 1981 and no ruling was made thereon by the Court. The Court, having maturely considered the pleadings, now finds that said demurrer should be overruled, but that the cross-bill now should be dismissed for reasons hereinafter set forth, on the Court's own motion.

This lawsuit was long and vigorously contested, and the Court is of the opinion that a summary of same should be made to place the matter in context.

The object of the suit, in addition to confirming the title of complainants, was to determine ownership of some 600 acres of land which are affected by Coastal tides and which are contained within the same description sought to be confirmed. The land as to which title is involved is bordered on the south by a significant watercourse, Bayou LaCroix. It is bordered on the east by a major watercourse, the Jourdan River. It also has marshes and watercourses in its interior, including two from which Interstate 10 construction sand was dredged by T.L. James & Co. – Bayou Enceinte and Long Gar Bayou.

The land was settled in the 18th and early 19th centuries, and the Crump, Allen and other landowners have since utilized the property.

The lawsuit was triggered as a reaction by complainants to actions of the Mississippi Marine Resources Council employees preparing a map (Exhibit 46) to serve as a guide to "wetlands" in Hancock County. This was part of their function in seeking to implement the Mississippi Coastal Wetlands Protection Act. Said map was filed in the office of the Chancery Clerk of Hancock County, Mississippi. In 1977 the Mississippi Mineral Lease Commission executed oil, gas and mineral leases to Saga Petroleum U.S., Inc., using descriptions taken off the aforesaid map, or "guide." The various leases (Exhibits C-36 to C-39) specified that the leased acreage was owned by the State by virtue of its classification as public trust land. A plat of the property was attached to the complaint (Exhibit 51). Aerial photographs showing the property and its boundaries were introduced as evidence in the trial (Exhibits C-64 and C-138).

The property generally lies on the west bank of the Jourdan River beginning at a point on Mallini Bayou north of the Jourdan River's intersection with Interstate 10. It runs southerly under Interstate 10 and is bounded for the most part on its west side by State Highway 603. Its southern edge is Bayou LaCroix, which flows into the Jourdan River, which itself flows into the Bay of St. Louis, an inlet of the Gulf of Mexico.

The State, Saga Petroleum U.S., Inc. and its assigns claim that any part of the property over which the tide ebbs and flows, up to the mean high water line, is owned by the State under the Public Trust Doctrine – literally – regardless of whether the watercourses were commercially navigable at Mississippi's admission into the Union, regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea, and regardless of whether the water be commercially navigable even now.

The cases reveal a multitude of decisions on this subject matter from whence our present law in Mississippi has evolved. The Court has gleaned from local and national cases that three tests have been applied to determine such issues in the past, and they are, briefly: "Navigability in fact," "ebb and flow of the tide," and "navigable capacity." Of the three tests "ebb and flow" is the oldest, having come to us from the common law of England. Federal law is unsettled on the subject, and various states have labored mightily with related problems as the importance of our seacoasts has come into focus.

The complainants (including defendant Phillips Petroleum Co. hereafter for convenience) claim that loose dicta has created wrongful impressions in similar Mississippi cases. They contend that while other Mississippi cases

have followed the public trust doctrine that such cases involved major "navigable" bodies of water or watercourses, all of which were used regularly for navigable purposes at the time Mississippi was admitted into the Union in 1817. The Phillips Petroleum Co. additionally asserted that the established rule in cases such as this would require boundary surveys to be made from headland to headland where a smaller body of water intersects with a larger body of water. The Court has found the case of *Knight v United Land Association,* 141 U.S. 161 (1891) of great interest with reference to the aforesaid "headlands" rule. Largely, however, the complainants maintained throughout the trial and in their argument that navigability in fact is the test which should apply under the facts of this case and they say this is a case of first impression. The complainants have contended throughout that no court of this state, until now, has been called upon to fix the inland reach of the public trust doctrine. If this be so, this court is faced with the proposition of winnowing out the proper test to be applied to the facts of this case and answering the basic issues which are presented; namely, whether the private landowners have title to the subject real property or whether some portion of it is owned by the State under the public trust doctrine; and, secondarily, whether the surveying methodologies and equipment utilized to locate the mean high water line in this case were correct.

In seeking a logical test to apply to the facts of this case the Court has been confronted with ambiguous precedent arising from prior efforts to balance the private interest with the public interest.

No person can question that we live in an advanced technological age today. Examples of this, relative to water navigation, are giant hovercraft which are propelled by fans over water, shallow draft boats propelled by

waterjets, airboats, swamp-buggies, and giant watercraft which run on narrow metal strakes just below the water's surface. Only inches of water can be considered navigable if the above craft are the vessels used for water travel. None of these were in existence until recent years, and most of these were developed after the time of the leading cases in this area of the law. Added to the technological development are heretofore uncontemplated changes, such as increased awareness of the value of the estuarine areas (of which this is one), both from an ecological and environmental point of view. Also, the Tidelands Cases, such as *U.S. v Louisiana*, 363 U.S. 1 (1960) have made us aware that oil, gas and other minerals are found in Coastal areas and have great value. Formerly, our primary Coastal interests were concerned with commerce and navigation by the craft of the day (ranging from pirogues and flatboats to great seagoing vessels), recreation, fishing of all kinds, and dredging of sand, shells and the like. Whole new concepts of sea agriculture and mining are coming into being, and Coastal areas are invariably involved. Our courts thus cannot ignore the present day realities of life and create an arbitrary or unbending test, or tests, in attempting to solve water problems. It is recalled that it was necessary for the courts to invent the "navigability in fact" test (as in *Culley v Pearl River Industrial Commission*, 108 So.2d 390 (1959)) in order to extend the jurisdiction of admiralty cases and the regulation of commerce to fresh water streams and bodies of water. If we allowed such tests to assume rigidity in the law we would inevitably confront different conceptual problems, which could and can be avoided in salt water cases by resort to the uncomplicated test of "ebb and flow." This test appears implanted in the law of our state and as interpreted is flexible enough to allow the legislature of the state to effectively deal with state-owned waterbottoms and tidelands when a proper

case is presented (See *Treuting v Bridge and Park Commission of Biloxi,* 199 So.2d 627 (Miss. 1967).).

This Court is of the opinion, and so finds, that the "ebb and flow" test is the appropriate one for application in this case. Further, that the inland reach of the public trust doctrine is to that horizontal line located at the intersection of the land with the water surface at the elevation of mean high water, wherever the tide ebbs and flows; and that said inland reach is determined in this case by the O'Hargan-Smith-Cole survey as combined.

Examination of the exhibits in this case which show the location of early land grants (Exhibit S-50, etc.) reveals that each of them was located on, near, or had access to a watercourse capable of floating shallow draft watercraft. The patents or grants creating these holdings make no specific references to small streams, inlets or bayous located therein. The term "bayou" was in vogue in those days and it was been defined as an offshoot of a river, an outlet of a lake, a small river or creek. *Richardson v State,* 91 SW 758-59. The term was also used in the Act of Congress dated March 3, 1811, §5, 2 Stat. 663, to mean "a channel through which commerce could be carried on by water." See *Surgett v. LaPice,* 12 L.Ed. 982 (1850). Several disputed puted watercourses in this lawsuit are called bayous. Even without reference to the ebb and flow test the Court finds there is sufficient evidence to indicate that the watercourses known as Bayou LaCroix, Bayou Enceinte, and Bayou Mallini were navigable waters or navigable in fact in 1817 since they carried commerce or were capable of doing so with reasonable improvements of the nature contemplated in *U.S. v. Appalachian Electric Power Co.,* 311 U.S. 377 (1940). There is no dispute as to the navigability of the Jourdan River. All the above watercourses have had tugs and barges plying their waters for many years, along

with pleasure and fishing craft. Each of them have provided safe haven for the various vessels of the Gulf Coast area during hurricane season. Long Gar Bayou has no demonstrated commercial history but it has been made more navigable, as has been Bayou Enceinte, by extensive dredging operations in an operation which was itself commercial. All of the aforesaid watercourses would today be classified navigable in fact according to federal admiralty jurisdiction and federal regulation of commerce. (See 1 *Benedict on Admiralty*, §141, (7th Ed. 1974), and *U.S. v Twin City Power Co.*, 100 L.Ed. 240 (1956).) This Court finds that all rivers and bayous designated as such in this lawsuit are navigable in fact at the present time, and that such water courses had navigable capacity in 1817.

This Court further finds that the cross-bill of the State of Mississippi should be dismissed because it would be next to impossible to reconstruct the amount of construction soil removed from Bayou Enceinte and Long Gar Bayou. The Court, having heard testimony and having considered other evidence in trial for more than a month, is of the opinion that it would be inordinately expensive to establish underwater lines of demarcation between the public trust land and privately owned land and to further extend trial of this case. It has been demonstrated conclusively that above-water proceedings are expensive since more than $300,000.00 was spent on surveys connected with this case. The legislature would be required to appropriate money to make such underwater explorations, and state engineers then would be required to compute the amounts of soil removed. This Court finds that all parties acted in good faith in contracting for use of the soil, and that the transaction should be closed without further legal action. The Court considers that the people of Mississippi

benefitted greatly by getting the construction material which was needed by the State Highway Department. The complainants benefitted by the sum paid, plus the advantages gained by having deep water to enhance their littoral and riparian rights. Such private littoral and riparian rights are unaffected by this ruling and they continue in full force and effect as the private property of the landowners, subject to navigational and commerce servitudes imposed by law. One reason for holding the "ebb and flow" test applicable to the circumstances of this case is that the mean high water line is the federal standard for littoral boundaries, as in Mississippi. The federal common law recognizes ambulatory boundaries, that is, tidal boundaries wherein the physical location of the mean high water line may shift because of natural or artificial changes in the shoreline. Littoral owners may gain or lose land; but normally, changes in the shoreline which occur suddenly and perceptibly do not result in a change of boundary or ownership. (See *Municipal Liquidators, Inc. v Trench*, 153 So.2d 728-30 (Fla. 1963).)

In this case it is obvious that some privately owned land was taken along with some public trust land, the amounts of which are unknown; but the Court finds that complainants are in no position to complain. As a basis for this finding the Court further finds that such taking was with the full consent and knowledge of all the complainants and that each participated by receipt of compensation according to their individual interest. There was no formal court condemnation, but since all parties of interest were joined in the transaction or were represented by an agent with their implied approval and knowledge, the complainants should be estopped from later claiming additional compensation for the taking of their private property. (See *Kaiser Aetna, et al. v United States*, 444 U.S. 164, 62

L.Ed.2d 332, 100 S. Ct. 383 (1979).) Proceeding further under the cross-bill would not be in the best interest of Mississippi taxpayers and would be inequitable to complainants. Because of the foregoing reasons, this Court concludes and finds that an order should be entered dismissing the cross-bill filed by the State of Mississippi at this time.

Another issue attempted to be raised during the course of the trial was that of the public's right of surface access for fishing and related uses wherever the tide ebbs and flows. The public's "right of pescary" (fishing) exists in all such areas. Such rights were settled by *Magna Charta*. Thereafter the common law rule was and is that ". . . all the subjects of the realm have a right to fish in the sea or any creek thereof or any tide river, the shore and soil of which place of fishing belong to the king or to the lord of the manor." S. Moore, *A History of the Foreshore*, 722 (1888), annotating Hall's *Essay*. The right to fish is vested in the public wherever the tide flows and reflows and irrespective of who owns the bottoms. This easement follows the tides. Moreover, the public has acquired recreational, transportational, fishing and other water sport rights in the waters involved in this lawsuit through the common law doctrines of custom and prescription. *State ex rel. Thornton v Hay*, 462 P.2d 671, 677 (Ore. 1969), and *United States v St. Thomas Beach Resorts, Inc.*, 386 F.Supp. 769, 773 (D.V.I. 1974). The Court finds that the public's right to fish in the disputed area is in no danger.

The complainant's record title (as defined by the plat Exhibit C-51, annexed as ENCLOSURE 1 immediately following as the next page) and continuous occupation and usage is not at issue. Both the State and Saga stipulated to these facts (Bush Affidavit, Exhibit C-43; Ex-

hibits 25, 25A, 26 and 26A). Therefore, a lengthy discussion of the chain of title is not necessary. The Court finds that the pertinent background facts relating to title, characteristics and usage of the land and the State's acts that caused this suit to be filed are as stated below.

John J. Jourdan, Noel Jourdan and Pierre Carco settled and claimed most of the subject property prior to April 15, 1813, while these lands were under Spanish Government (See areas B, E, R and G on Exhibit C-51). In order to clearly define private boundaries in the newly-acquired territory which had previously been a part of Spanish West Florida, the United States Congress on March 3, 1819, enacted "An Act for adjusting the claims to land, and establishing land offices, in the districts east of the island of New Orleans." Noel Jourdan, John J. Jourdan and Pierre Carco presented their respective land claims and these claims were duly surveyed by Major Elihu Carver, United States Deputy Surveyor (Exhibits C-40, 170 & 171). The John J. Jourdan Claim No. 23, the Noel Jourdan Claim No. 28, and the Pierre Carco Claim No. 25 were confirmed by an express act of Congress dated May 8, 1822, entitled "An Act supplementary to the several acts for adjusting the claims to land, and establishing land offices, in the districts east of the island of New Orleans." The John J. Jourdan Claim No. 8 (also referred to as Claim No. 3) was confirmed by Act of Congress dated May 28, 1830, entitled "An Act to confirm certain claims to lands in the district of Jackson Courthouse, in the State of Mississippi." The United States and the State of Mississippi subsequently issued patents on each of these claims (Bush Affidavit Exhibit C-43).

According to the testimony of Dr. Smith (of Advanced Development Co.) and the official patents, the 1827 town-

ship plat, page 3 of Exhibit C-40, is the official plat for the John J. Jourdan Claim No. 23 and the Noel Jourdan Claim No. 28. The official township plat for the John J. Jourdan Claim No. 8, which was surveyed and approved in 1830, is the 1843 plat, page 4, Exhibit C-40.

All other parts of the subject property were granted to private individuals through subsequent claims, swampland patents or other patents from the state and federal governments during the 1800s. By the turn of the century in 1900 all of the subject property was held privately, the vast majority of which was settled and in the private sector by 1830 (Bush Affidavit Exhibit C-43 and deraignment of title attached thereto; Exhibits C-1 through C-24A).

In the years 1925 and 1926, Dr. Carroll Allen acquired title to all of the subject property from successors in title to the original settlers, the Jourdans, Pierre Carco and others. James L. Crump acquired title to this property in 1946 from the heirs of Dr. Allen. Dr. Allen's heirs reserved a one-half interest in the minerals, which interest is now owned by the surviving heirs, his son and daughter, Lydia Allen and Carroll Allen, Jr., who are complainants.

On July 25, 1947, James Crump conveyed a small parcel of this land to Harry B. Kelleher, who is a complainant herein.

James L. Crump died testate in 1963, and after the expiration of certain trust provisions the property vested in 1971 in his nieces and nephews, Evelyn Crump Johnson, Helen Crump Cutler, Joseph R. Crump, Armand B. Crump and Donald E. Crump. On November 25, 1973, the nieces and nephews conveyed the title to the complainant, the Cinque Bambini Partnership, which they wholly own and control.

The grants and the patents dating from the early nineteenth century purport to place into private ownership all of the inland area. From the earliest date all of the land inside the grants and patents has been sold as private property without any attempt to except, meander or otherwise take note of the interior streams (See Deeds to Allen, Exhibits C-30 through 35; Deed to Crump, Exhibit C-29; and deraignment of title in general, Exhibit C-43). The landowners have for over 150 years paid taxes on the entire acreage in these claims and grants.

Fritz Harris, the farm manager for the Crump family since 1952, testified that the land had been used for various agricultural uses over the years, including raising timber, rice, clover and, in the upland areas, soybeans. At one time before Highway I-10 was built, James L. Crump used this area for pasture for four hundred head of cattle. Each winter the marsh grass was burned off to provide good spring and early summer grazing for the cattle down to the water's edge. The cattle often grazed down to the edge of the Jourdan River and Bayou LaCroix and drank water from both the river and the bayou. The saltiness of the water depended on the state of the tide, recent rains, wind conditions, and the like.

So far as the interior drainage streams are concerned, Mr. Harris stated that he occasionally saw a fisherman on one or two of them, but that was rare. Mr. Harris stated that the Crump family had always paid taxes on the entire area and that to his knowledge no one had ever questioned the Crumps' ownership until the Mississippi Marine Resources Council (MMRC) filed its maps in the County Courthouses in Hancock, Harrison and Jackson Counties purporting to define the Wetlands area (Exhibit C-46).

When the Mississippi Legislature enacted the Coastal Wetlands Protection Law in 1973, Miss. Code Ann. 49-

27-1 *ET SEQ.*, §49-27-5 defined "Coastal Wetlands" as follows:

> "§49-27-5. Definitions.
>
> (a) *'Coastal wetlands'* means all *publicly owned lands* subject to the ebb and flow of the tide; which are *below the watermark of ordinary high tide;* all publicly owned accretions above the watermark of ordinary high tide and all publicly owned submerged water-bottoms below the watermark of ordinary high tide.
>
> (b) The term 'coastal wetlands' shall be interpreted to include the flora and fauna on the wetlands and in the wetlands." (Emphasis added.)

The Act provided, among other things, that the Mississippi Marine Resources Council should prepare charts showing the distribution of the "Coastal Wetlands" and file them in the Chancery Clerk's office for each county affected. The specific language of the statute is as follows:

> "§49-27-65. Evaluation of coast wetlands – charts – overall use plan.
>
> (a) In order to implement the policy set forth in the chapter and to assist the commission in protection of coastal wetlands, the council acting with the cooperation and assistance of the Gulf Regional Planning Commission and the Gulf Coast Research Laboratory shall evaluate the coastal wetlands and prepare charts at an appropriate scale showing the distribution of coastal wetlands as defined in this chapter. These charts will be provided to the offices of the chancery clerk of affected counties and to the Gulf Regional Planning Commission. The charts will be updated and reissued periodically as need-

ed to provide a current inventory of coastal wetlands."

According to Joe Gill, who is charged with supervision of the Coastal Wetlands Law, after the foregoing statutes were adopted members of the MMRC met with members of the Gulf Regional Planning Commission and the Gulf Coast Research Laboratory to define the extent of the wetlands. They took maps which had been prepared by the Gulf Regional Planning Commission and "eyeballed" the areas in each county which they felt should be in the wetlands. Mr. Gill acknowledged that no survey was made and that no tidal data was collected or used in the mapping process. Nevertheless, these maps were recorded in the Chancery Clerks' offices in the three coastal counties as the official coastal wetlands charts or maps.

Both Mr. Lewis and Mr. Gill stated that they had never represented that these maps accurately defined the publicly owned lands and each stated the MMRC used them for jurisdictional purposes only. Since their jurisdiction by statute is limited to the publicly owned lands, the maps alone created a cloud on complainants' title. However, the more serious problem arose when the Mississippi Mineral Lease Commission used these same maps to lease minerals. Mr. Gill and Mr. Lewis both stated that they told the Mineral Lease Commission that these maps were not to be used for title purposes. But they both agreed that, notwithstanding their warning, the Mineral Lease Commission did use their "eyeballed" wetlands map for leasing. The result was that in 1977 Saga was granted the aforesaid leases (Exhibits C-36, 37, 38 and 39) which purported to lease state-owned lands only, but which obviously granted the right to explore for and develop and produce minerals on approximately 600 acres of the land within the complainants' land lines. All four leases were recorded in the

Chancery Clerk's office in Hancock County (Oil and Gas Book 32 at pages 575, 577, 579 and 585). The encroachment is vividly shown by the red line overlay prepared by Dr. Smith (Exhibit C-64A).

According to the testimony of Mr. Joseph Crump, after the complainants learned about the leases to Saga they contacted representatives of the State to find out what was going on. They soon learned that the State was claiming this 600 acres.

Complainants, Cinque Bambini Partnership, conducted boundary surveys of the lands involved in this lawsuit, including those areas adjacent to the Jourdan River, Bayou LaCroix, and other bayous and inlets, and these surveys were conducted with the use of conventional land surveying procedures, marine surveying techniques, and photogrammetric surveying procedures and techniques to determine the boundaries of the property which is the subject of this lawsuit.

Defendants, State of Mississippi and Saga Petroleum U.S. Inc., et al., conducted boundary surveys of the eastern and southern portions of the lands adjacent to the Jourdan River, Bayou LaCroix, and other bayous and inlets, the subject of this lawsuit, and these surveys were conducted with the use of conventional land surveying procedures, marine surveying techniques and photogrammetric surveying procedures and techniques. Photogrammetric surveying is surveying by making measurements on photographs.

After considerable testimony and evidence it became apparent that the results of the conventional land surveying procedures, the results of the marine surveying techniques, and the results of the photogrammetric surveying procedures were very similar and that the subsequent location

by both parties of mean high water points on the land surveyed by the above methods were practically identical. The surveying techniques utilized were very accurate and acceptable in establishing a mean high tide line adjacent to the complainants' lands. As a result these parties, with the exception of Phillips Petroleum Company, entered into a stipulation that the mean high water points, as shown on Exhibit C-64, were properly located as mean high water points and were originally identified as 2x4 orange stakes. This stipulation did not preclude the question of tidal waters being present in other areas of inlets and bayous, nor did it conclude that there were no other survey points located as mean high water points along the inlets and bayous adjacent to this property.

Complainant, Cinque Bambini Partnership, is the owner of the surface and an undivided one-half (½) interest in all lands described in Exhibit S-258 (attached in part as Addendum 1), less and except the following parcels which are below the ebb and flow of the tide and therefore vested in and held in trust by the State of Mississippi:

Parcel 8 (Exhibit S-258 at p. 8; plat introduced as Exhibit S-262), containing 0.679 acres, more or less;

Parcel 7 (Exhibit S-258 at p. 9; plat introduced as Exhibit S-264), containing 4.247 acres, more or less;

Parcel 6 (Exhibit S-258 at p. 10; plat introduced as Exhibit S-261), containing 0.083 acres, more or less;

Parcel 5 [excluding that area covered within Parcel 5A], (Exhibit S-258 at pp. 11-14; plat introduced as Exhibit S-266), containing 5.82 acres, more or less;

Parcel Stenum (From testimony of Lugene P. Stenum on August 28, 1981, and identified in orange

by the initials L.P.S. and date on Exhibit S-175), containing 0.44 acres, more or less;

Parcel 5A (Exhibit S-258 at p. 15), containing 98.00 acres, more or less;

Parcel 4 (Exhibit S-258 at p. 16; plat introduced as Exhibit S-260), containing 0.968 acres, more or less;

Parcel 3C (Exhibit S-258 at p. 17; plat introduced as Exhibit S-263), containing 1.282 acres, more or less;

Parcel 3B (Exhibit S-258 at p. 18; plat introduced as Exhibit S-263), containing 0.583 acres, more or less;

Parcel 3A (Exhibit S-258 at p. 19; plat introduced as Exhibit S-263), containing 0.855 acres, more or less;

Parcel 2C (Exhibit S-258 at p. 20; plat introduced as Exhibit S-265), containing 13.232 acres, more or less;

Parcel 2B (Exhibit S-258 at p. 21; plat introduced as Exhibit S-265), containing 2.208 acres, more or less;

Parcel 2A (Exhibit S-258 at pp. 22-23; plat introduced as Exhibit S-265), containing 9.966 acres, more or less;

Parcel 1A (Ex. S-258 at p. 25) containing 2.5 acres more or less;

and less and except the Kelleher tract described below, and less and except the surface tract of Mississippi Power Company described below, and subject to the oil, gas and mineral leases, surface easements, unrecorded surface

leases set forth in the Bill of Complaint, and right-of-ways and pooling declarations reflected by the public records as they may apply. The paragraphed parcels referred to above are graphically depicted on photographic Exhibits S-174, S-175 and S-176 with overlays.

Addendum 1 (Exhibit S-258 in part) contains a complete description of the property in question. Parcel 1A (Exhibit S-258 at p. 25) consists of a bayou which is subject to the ebb and flow of the tide and empties into Bayou LaCroix. Parcel 1A describes this bayou as most of it existed prior to its alteration by dredging. The remainder of this bayou is included in this description as it has been dredged at its lower end.

Parcel 5A (Exhibit S-258 at p. 15), which overlaps with Parcel 5, consists of the remains of Bayou Enceinte and the remains of Long Gar Bayou, and also includes the dredged lakes and connecting canals as they presently exist. Parcel 5 (Exhibit S-258 at p. 11; plat introduced as Exhibit S-266) consists of Bayou Enceinte and Long Gar Bayou as they existed prior to the dredging of the lakes and connecting canals which now exist. The original entrance and channel of Bayou Enceinte, which has been filled and lies between the Jourdan River and Parcel 5A, is included as part of Parcel 5 but not of Parcel 5A. Although Parcel 5 is overlapped by Parcel 5A in all areas except that portion of the original channel which has been filled, Parcel 5 is included in order to include the old original channel which was filled. The original entrance and channel of Bayou Enceinte which is now filled constitutes 5.82 acres, more or less.

Parcels 5 and 5A are excepted from the lands described as belonging to the complainants since the parcels are subject to the ebb and flow of the tide. Also excepted from the

lands belonging to the complainants is that area at the upper reaches of Bayou Enceinte which is subject to the ebb and flow of the tide as testified to by Lugene P. Stenum in his testimony on August 28, 1981, and identified in orange by the initials L.P.S. and date on Exhibit S-175. Such area constitutes .44 acres, more or less.

Complainant, Harry B. Kelleher, is the owner of the surface and an undivided one-half (½) mineral interest in the following described land, less and except any part below the mean high tide and therefore owned and held as trust property by the State of Mississippi and described below, situated in Hancock County, Mississippi, as follows:

> That tract of land comprising part of the John J. Jourdan Claim No. 23 and part of Section 4 described as follows:
>
> Beginning at an iron stake set 23 feet North of the corner of Sections 54/89, of Township 8 S. Range 14 W., (said section corner also being the upper northwest corner of the Noel Jourdan Claim); thence ing N. 52° W. 642 feet to an iron stake set on the eastern line of the public road; thence northerly along said road 2050 feet, more or less, to fork of roads; thence easterly along the southern line of the right fork of said road 910 feet, more or less, to the eastern line of the J.J. Jourdan Claim; thence along said claim line S. 12° E. 523 feet to an iron stake set for the southwest corner of land of Birghenti, where the line between Lots 1 and 2 of the divison of John J. Jourdan Claim intersects said claim line; thence east 300 feet, more or less, to the East bank of Jourdan River; thence southerly, along the meanderings of said river to a point 23 feet North of the section line between Sections 4 & 9; thence West to the place of beginning. Being a part of the J.J. Jourdan Claim

and a part of Lot No. 5 of fractional Section 4; all in Township 8 S. Range 14 West in Hancock County, Mississippi; less and except that 1.83 acre tract described as follows:

Beginning at an iron stake set 23 feet north of the corner of Sections 5, 4, 8 and 9 of Township 8 South, Range 14 West (said section corner also begin the upper northwest corner of the Noel Jourdan claim); thence running North 52° West 510.3 feet to an iron stake for a fence corner; thence running South 75° 10' East 434.9 feet along the fence to an iron stake set at an angle in the fence; thence running South 59° 40' East 400.2 feet along the fence to an iron stake at a fence corner; thence running West 363.4 feet to the point of beginning.

The title of Kelleher is subject to the oil, gas and mineral lease, easements and right-of-ways and pooling declarations reflected by the public records, as they may apply.

Complainants, Carroll W. Allen Jr. and Lydia Carroll Hamilton Allen, each own an undivided one-fourth (¼) mineral interest in all lands described in Addendum 1 (Exhibit S-258 in part), less and except the following parcels which are below the ebb and flow of the tide and therefore vested in and held in trust by the State of Mississippi:

Parcel 8 (Exhibit S-258 at p. 8; plat introduced as Exhibit S-262), containing 0.679 acres, more or less;

Parcel 7 (Exhibit S-258 at p. 9; plat introduced as Exhibit S-264), containing 4.247 acres, more or less;

Parcel 6 (Exhibit S-258 at p. 10; plat introduced as Exhibit S-261), containing 0.083 acres, more or less;

Parcel 5 [excluding that area covered within Parcel 5A], (Exhibit S-258 at pp. 11-14; plat intro-

duced as Exhibit S-266), containing 5.82 acres, more or less;

Parcel Stenum (from testimony of Lugene P. Stenum on August 28, 1981, and identified in orange by the initial L.P.S. and date on Exhibit S-175), containing 0.44 acres, more or less;

Parcel 5A (Exhibit S-258 at p. 15), containing 98.00 acres, more or less;[1]

Parcel 4 (Exhibit S-258 at p. 16; plat introduced as Exhibit S-260), containing 0.968 acres, more or less;

Parcel 3C (Exhibit S-258 at p. 17; plat introduced as Exhibit S-263), containing 1.282 acres, more or less;

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[1]Parcel 5a (Exhibit S-258 at p. 15); which overlaps with Parcel 5, consists of the remains of Bayou Enceinte and the remains of Long Gar Bayou, and also includes the dredged lakes and connecting canals as they presently exist. Parcel 5 (Exhibit S-258 at p. 11; plat introduced as Exhibit S-266) consists of Bayou Enciente and Long Gar Bayou as they existed prior to the dredging of the lakes and connecting canals which now exist. The original entrance and channel of Bayou Enciente, which has been filled and lies between the Jourdan River and Pacel 5A, is included as part of Parcel 5 but not of Parcel 5A. Although Parcel 5 is overlapped by Parcel 5A in all areas except that portion of the original channel which has been filled, Parcel 5 is included in order to include the old original channel which was filled. The original entrance and channel of Bayou Enceinte which is now filled constitutes 5.82 acres, more or less.

Parcels 5 and 5A are excepted from the lands described as belonging to the complainants since the parcels are subject to the ebb and flow of the tide. Also excepted from these lands belonging to the complainants is that area at the upper reaches of Bayou Enceinte which is subject to the ebb and flow of the tide as testified to by Lugene P. Stenum in his testimony on August 28, 1981, and identified in orange by the initials L.P.S. and date on Exhibit S-175. Such area constitues .44 acres, more or less.

Parcel 3B (Exhibit S-258 at p. 18; plat introduced as Exhibit S-263), containing 0.583 acres, more or less;

Parcel 3A (Exhibit S-258 at p. 19; plat introduced as Exhibit S-263), containing 0.855 acres, more or less;

Parcel 2C (Exhibit S-258 at p. 20; plat introduced as Exhibit S-265), containing 13.232 acres, more or less;

Parcel 2B (Exhibit S-258 at p. 21; plat introduced as Exhibit S-265), containing 2.208 acres, more or less;

Parcel 2A (Exhibit S-258 at pp. 22-23; plat introduced as Exhibit S-265), containing 9.966 acres, more or less;

Parcel 1A (Exhibit S-258 at p. 25), containing 2.5 acres, more or less;

and subject to the oil, gas and mineral leases, easements, right-of-ways and pooling declarations reflected by the public records, as they may apply. The numbered parcels referred to above are graphically depicted on photographic Exhibits S-174, S-175 and S-176 with overlays.

The Mississippi Power Company is the owner of the surface of the following described land situated in Hancock County, Mississippi, pursuant to the terms of its deed of record, to-wit:

A tract in the Pierre Carco Claim No. 25 described as follows:

Commence at the Northwest corner of the Pierre Carco Claim No. 25 and run South 75° 14' West 397.9 feet to an iron rod for the point of beginning; thence running South 12° 54' East 300 feet to an iron rod; thence South 77° 06' West to an iron rod in the East

boundary of the Bay-Kiln Road; thence along said road North 6° 49' East 236.8 feet; thence continuing along said road North 10° 14' East 84.4 feet to an iron rod; thence North 77° 06' East 300 feet, more or less, to the point of beginning, containing 2.45 acres, more or less (Book H-8, Page 454).

Title to the foregoing lands shall be confirmed and quieted in and to said owners.

The following lands are below the mean high tide line and are subject to the ebb and flow of the tide, and title to these lands is vested in the defendant, State of Mississippi, as a sovereign state in trust for all of its people. The numbered parcels referred to below are graphically depicted on photographic Exhibits S-174, S-175 and S-176 with overlays. The State of Mississippi is the owner of the surface and all mineral interests in the lands described by the following:

Parcel 8 (Exhibit S-258 at p. 8; plat introduced as Exhibit S-262), containing 0.679 acres, more or less;

Parcel 7 (Exhibit S-258, p. 9; plat introduced as Exhibit S-264), containing 4.247 acres, more or less;

Parcel 6 (Exhibit S-258 at p. 10; plat introduced as Exhibit S-261), containing 0.083 acres, more or less;

Parcel 5 [excluding that area covered within Parcel 5A], Exhibit S-258 at pp. 11-14; plat introduced as Exhibit S-266), containing 5.82 acres, more or less;

Parcel Stenum (From testimony of Lugene P. Stenum on August 28, 1981, and identified in orange by the initials L.P.S. and date on Exhibit S-175), containing 0.44 acres, more or less;

Parcel 5A (Exhibit S-158 at p. 15), containing 98.00 acres, more or less;[2]

Parcel 4 (Exhibit S-258 at p. 16; plat introduced as Exhibit S-260), containing 0.968 acres, more or less;

Parcel 3C (Exhibit S-258 at p. 17; plat introduced as Exhibit S-263), containing 1.282 acres, more or less;

Parcel 3B (Exhibit S-258 at p. 18; plat introduced as Exhibit S-263), containing 0.583 acres, more or less;

Parcel 3A (Exhibit S-258 at p. 19; plat introduced as Exhibit S-263), containing 0.855 acres, more or less;

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[2]Parcel 5a (Exhibit S-258 at p. 15), which overlaps with Parcel 5, consists of the remains of Bayou Enceinte and the remains of Long Gar Bayou, and also includes the dredged lakes and connecting canals as they presently exist. Parcel 5 (Exhibit S-258 at p. 11; plat introduced as Exhibit S-266) consists of Bayou Enciente and Long Gar Bayou as they existed prior to the dredging of the lakes and connecting canals which now exist. The original entrance and channel of Bayou Enciente, which has been filled and lies between the Jourdan River and Pacel 5A, is included as part of Parcel 5 but not of Parcel 5A. Although Parcel 5 is overlapped by Parcel 5A in all areas except that portion of the original channel which has been filled, Parcel 5 is included in order to include the old original channel which was filled. The original entrance and channel of Bayou Enceinte which is now filled constitutes 5.82 acres, more or less.

Parcel 5 and 5A are excepted from the lands described as belonging to the complainants since the parcels are subject to the ebb and flow of the tide. Also excepted from the lands belonging to the complainants is that area at the upper reaches of Bayou Enceinte which is subject to the ebb and flow of the tide as testified to by Lugene P. Stenum in his testimony on August 28, 1981, and identified in orange by the initials L.P.S and date on Exhibit S-175. Such area constitutes .44 acres, more or less.

Parcel 2C (Exhibit S-258 at p. 20; plat introduced as Exhibit S-265), containing 13.232 acres, more or less;

Parcel 2B (Exhibit S-258 at p. 21; plat introduced as Exhibit S-265), containing 2.208 acres, more or less;

Parcel 2A (Exhibit S-258 at pp. 22-23; plat introduced as Exhibit S-265), containing 9.966 acres, more or less;

Parcel 1A (Exhibit S-258 at p. 25), containing 2.5 acres, more or less;

Subject to oil, gas and mineral leases in favor of Saga Petroleum U.S. Inc., and assignments thereof in Exhibits S-172 and S-173 and other assignments as disclosed by the public records, as said leases are recorded in Oil, Gas and Lease Records of Hancock County, Mississippi in Book 30 at Page 500, Book 32 at page 575, Book 32 at Page 577, Book 32 at Page 479, and Book 32 at Page 585, together with all pooling declarations reflected by the public records.

The oil, gas and mineral leases referred to in the above paragraph cover and affect only the lands described in said paragraph, and each of the leases issued to Saga Petroleum U.S. Inc. contained the following described language: "All State-owned lands subject to the ebb and flow of the tide and which are below the water mark of ordinary (mean) high tide." None of these leases cover and affect any other lands described in the Bill of Complaint and to the extent that they may purport to do so they are null and void and of no effect.

Testimony showed water bottoms subject to the ebb and flow of the tide up to mean high tide have long been con-

sidered by local boaters, fishermen and individuals involved in recreation to belong to the State and not to any private individual.

A weir was constructed across the channel of Bayou Enceinte which hindered the navigation along that channel. After its construction the weir was damaged by explosives and partly destroyed.

A Special Borrow Pit Lease Agreement was executed on September 18, 1967 between the Estate of James L. Crump and the T.L. James & Company, Inc. for the removal of dirt and fill material from Bayou Enceinte and Long Gar Bayou and adjacent Crump property. The State of Mississippi was not a direct party to that lease agreement nor was such a lease agreement authorized by an act of the Mississippi Legislature or other appropriate body on behalf of the State of Mississippi.

The original bed of Bayou Enceinte and Long Gar Bayou has been substantially altered by a dredging operation conducted by T.L. James & Company, Inc. under a Special Borrow Pit Lease Agreement dated September 18, 1967, entered into with the Estate of James L. Crump which owned the upland property adjacent to the original channel of Bayou Enceinte and Long Gar Bayou.

The Mississippi State Highway Department contracted with T.L. James & Company, Inc. for the construction of Interstate 10 through Hancock County. The Mississippi State Highway Department is not the State's representative in tideland matters. There is no power or authority vested in the Mississippi State Highway Department to sell or lease tidelands held in trust by the State of Mississippi.

A substantial amount of dirt was removed from the original bed of Long Gar Bayou and Bayou Enceinte and

from adjacent upland property next to those bayous, thereby lowering those adjacent properties to such a level that the portions as lowered are covered by the ebb and flow of the tide, as was the original channel of the two bayous both prior to and after the dredging operation. No permission or authority was granted by the Mississippi Legislature or other appropriate body on behalf of the State of Misssissippi for the dredging of the original channel of the two bayous.

The original mean high watermark on the banks of Bayou Enceinte and Long Gar Bayou has been obliterated and destroyed during the dredging activities conducted by T.L. James & Company, Inc. under the Special Borrow Pit Lease Agreement.

The mouth of the original channel of Bayou Enceinte was filled during the dredging operation by the T.L. James & Company, Inc. pursuant to the Special Borrow Pit Lease Agreement dated September 18, 1967. Property constituting the original channel which was below mean high tide was filled in to the exclusion of the ebb and flow of the tide. No permission or authority was granted by the Mississippi Legislature or other appropriate body on behalf of the State of Mississippi for the filling in of the mouth of the original channel of Bayou Enceinte.

A new artificial channel was constructed for the mouth of Bayou Enceinte which resulted in property originally owned by the Crumps being lowered below the level of mean high tide. This construction was performed by the T.L. James & Company, Inc. pursuant to the Special Borrow Pit Lease Agreement dated September 18, 1967.

The interior bayous, inlets and streams denoted in Exhibits S-258 at pages 15 and 25, S-260, S-261, S-262, S-263, S-264, S-265 and S-266, which were within the pro-

perty the subject of this lawsuit, contain waters navigable by fishing vessels, recreational boating vessels, and other vessels; and the beds of the interior bayous, inlets, and streams are below mean high tide and are subject to the ebb and flow of the tide.

The State of Misssissippi at no time conveyed by legislative act the submerged lands subject to the ebb and flow of the tide which are the subject of this suit to the complainants. No individual or agency of the Government of the State of Mississippi, including the State Land Commissioner, was authorized to convey any part of land held in trust by the State of Mississippi subject to the ebb and flow of the tide to private individuals for private purposes.

No evidence was introduced which clearly proved that title to submerged lands below the ebb and flow of the tide in the area the subject of this lawsuit was ever conveyed to private individuals by any grant or conveyance.

The National Ocean Survey, National Oceanic and Atmospheric Administration, United States Department of Commerce, is the acknowledged authority in the United States with respect to mean high tide readings.

The State of Mississippi utilized a highly technical and sophisticated technique of photogrammetry to conduct its survey, along with examination of vegetation and on-the-ground measurement. Such photogrammetric technique is utilized by the United States Government in the targeting of advanced missiles and can be accurately utilized to survey the boundary lines of property which is adjacent to submerged lands subjected to the ebb and flow of the tide.

For purposes of uniformity in establishing tidal datums and mean high water lines, a standard tidal epoch is designated by the National Ocean Survey, National Oceanic

and Atmospheric Administration, United States Department of Commerce. An 18.6 year cycle is required for the purpose of establishing a Tidal Datum Epoch, as this is the period of time required for the moon to make a 360 degree revolution of the earth in its orbit. It was undisputed at the trial that the National Ocean Survey (NOS) is the recognized authority for this purpose.

Two different Tidal Datum Epochs were furnished by the National Ocean Survey to the parties conducting their surveys. The complainants began their survey with one Tidal Datum Epoch in effect (Exhibit C-66). The National Ocean Survey, during the normal course of business, implemented by publication at 45 Federal Register 70296 and 70297 (October 23, 1980), a new Tidal Datum Epoch (Exhibit C-113). This second, or new epoch, which was in effect and in the place of the old epoch utilized by complainants, was utilized by the State in its survey. The difference between the use of those two epochs was found to be insignificant with respect to the results obtained. Both parties used the Tidal Datum Epoch in effect on the date of the initiation of their surveys. Utilization of the Tidal Datum Epoch in effect is a proper method to be used in surveys of this type.

In August 1977 the State of Mississippi entered into a Cooperative Agreement with the National Ocean Survey for a tidal datum survey for the State of Mississippi. Under this agreement the National Ocean Survey's permanent tidal gauge at Pensacola, Florida was utilized along with one at the Bay-Waveland Station at Waveland, Mississippi, together with other secondary tidal gauge stations of lesser duration in the area of the lands involved in this lawsuit. After tide gauge information was recorded at these stations all of this information was transmitted to the National Ocean Survey and processed by that agency

under the Cooperative Agreement and subsequently utilized by the surveyor for the complainants and by the surveyor for the State of Mississippi. It was undisputed by all parties that this is the best information available for surveys of this type.

Captain Wesley Hull, Associate Director, Office of Oceanography, National Ocean Survey, devoted a major portion of his testimony to analyzing the various methods available to establish a mean high water line and the extensive experience of National Ocean Survey in this respect. Captain Hull, himself, is one of the nation's foremost experts on the subject, having over twenty years of experience. His testimony clearly confirmed the surveying techniques, procedures and equipment utilized by the expert surveyors and their crews in establishing the mean high water line. The methods utilized by these surveyors have been accepted for many years, and the relative accuracy, both horizontally and vertically, of the methodology and equipment utilized was well within the accepted conventional surveying standards.

Mr. George Cole, surveyor for the State of Mississippi, placed tidal gauges equipped with cameras at various locations within the area the subject of this lawsuit. Mr. Cole's gauges C-1, C-2, C-3 and C-4 north of Fish Island, as identified on Exhibit S-174 with overlays, were positioned at the upper reaches of streams and bayous north of Bayou LaCroix. Gauge C-5, as identified on Exhibit S-175 with overlays, was located on a stream flowing into the Jourdan River. As identified on Exhibit S-175 with overlays, C-6 was located at the upper reaches of the original natural channel of Long Gar Bayou, and C-7 and C-8 were located on the upper reaches of the original natural channel of Bayou Enceinte. Mr. Cole located another gauge at the site of the National Ocean Survey gauge 874-8087 on

the Jourdan River at the Kelleher Fish Camp, as identified on Exhibit S-176 with overlays. Gauges C-10 and C-11, as identified on Exhibit S-176 with overlays, were located on a tidal stream just above the Kelleher Fish Camp. Mr. Cole testified that the tide ebbed and flowed at each location. Film from gauges at National Ocean Survey gauge 874-8087, C-4 and C-8 were introduced as Exhibits S-203, S-204 and S-205, respectively. These uncontradicted exhibits graphically showed the ebb and flow of the tide at their respective locations. Charts which were introduced as Exhibits S-181 and S-182 correlated the ebb and flow of the tide at National Ocean Survey gauge 874-8087, C-4 and C-8, with tidal activity at the National Ocean Survey Control Station at Pensacola, Florida and the station at the Bay-Waveland Station at Waveland, Mississippi.

The utilization of photogrammetry facilitates the State of Mississippi in its efforts to map the mean high tide line along those areas adjacent to the submerged lands subjected to the ebb and flow of the tide in the State of Mississippi. The utilization of photogrammetry allows the Bureau of Marine Resources to perform its surveys economically, and such surveys are of great assistance to those individuals adjacent to the properties which are submerged and belong to the State and are held in trust under the Public Trust Doctrine.

Marine Resources maps introduced as Exhibit C-46 do not constitute a claim of ownership as is specifically set forth on the cover of those maps. The overlay to Exhibit C-46 states:

> "It is emphasized that the line depicting the aerial extent of Coastal Wetlands is intended only as a guide to provide supplementary information regarding 'regulated activities' defined in the

> Coastal Wetlands Protection Act and does not depict ownership or property boundaries . . . . Final determination of permitting jurisdiction for any area or activity will be based on field investigation. . . ."

Those maps only deal with the jurisdictional limits of the Bureau of Marine Resources. As testimony clearly indicated, those maps were utilized as guides only for the leasing of the state minerals by the State Mineral Lease Commission since those maps were the best maps available at that time.

CONCLUSIONS OF LAW

1. This is a case to cancel cloud on title to property in Township 8 South, Range 14 West, Hancock County, Mississippi. This Court has jurisdiction over such actions pursuant to Section 11-17-29, Miss. Code Annotated (1972). It is not intended to, nor does it affect, riparian or littoral rights of the boundaries. Neither does it affect the public's right of pescary (fishing) where the tide ebbs and flows.

2. The State of Mississippi was created by an Act of Congress dated March 1, 1817 entitled "An Act to enable the people of the western part of the Mississippi territory to form a constitution and state government, and for the admission of such state into the union, on an equal footing with the original states."

3. At the common law, lands lying between high and low tide were lands of the king, but held by him as trustee in his sovereign capacity for all the people and not by him in a proprietary capacity. When the several states were recognized as free and independent governments by the English nation after the Revolutionary War, the owner-

ship of, and dominion and sovereignty over lands covered by tidewaters, and the fresh waters of the great lakes within the limits of the several states, belonged to the respective states within which they were found, with the consequent right to use or dispose of any portion thereof, when that could be done without impairment of the interest of the public in the waters, subject to the right of Congress to control their navigation for the regulation of commerce. Section 81 of the Constitution of Mississippi was adopted by the Constitutional Convention for the purpose of aligning Mississippi with those states which hold that a state cannot convey in fee such rights to private owners for private purposes. *Money v Wood,* 152 Miss. 17, 118 So. 359 (1928).

4. At the common law, the title to lands under the tidal waters below high water mark belonged to the crown and were held by the king in trust for the use of his subjects. The primary uses were navigation, bathing and fishing. Thus it was held that the title of the king was vested in him for the benefit of the people. This common law doctrine was carried over into the United States, including Mississippi. The State holds title to lands under the tidal navigable water in trust for the people, for the purposes of navigation, fishing, bathing, and similar uses. *Treuting v Bridge and Park Com'n of City of Biloxi,* 199 So.2d 632 (Miss. 1967).

On occasion the Mississippi Legislature has authorized an entity to reclaim submerged lands and to sell and lease them for industrial use on such terms as will best promote and protect the public interest. *Treuting,* (id.).

5. It is well settled that upon the question involved herein, Mississippi adopted the common law as it prevails in England. The rule is announced, in substance, in 3

Kent's Comm. 427, as a principle of the English Law, that the right of soil of owners of land bounded by the sea, and on other navigable waters, where the tide ebbs and flows, extends to the high water mark; that the shore below ordinary high water belongs to the State, as trustee for the public; that in England the crown, and in this country the people, have the absolute proprietary interest in the same as in tide waters; that they belong to the public, except that the proprietors adjoining fresh water rivers own the soil. *State ex rel. Rice v Stewart,* 184 So. 44, 47 (1938).

6. When the revolution which led to the establishment of the United States took place, the people of each state became themselves sovereign and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered under the Constitution. *Martin v The Lessee of Waddell,* 41 U.S. 367, 10 L.Ed. 997 (1842).

7. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. The new states have the same rights, sovereignty, and jurisdiction over them as the original states. *State ex rel. Rice v Stewart,* supra, at 49.

8. When the revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them, subject only to the rights since surrendered by the Constitution. *State ex rel. Rice v Stewart,* supra, at 49.

9. Upon the American Revolution all the proprietary rights of the Crown and Parliament in, and all their domi-

nion over, lands under tidewater vested in the several states. *State ex rel. Rice v Stewart,* supra, at 49.

10. It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tidewaters in the original states were reserved to the several states, and that the new states since admitted have the same rights, sovereignty and jurisdiction in that behalf, as the original states possess within their respective borders. *State ex rel. Rice v Stewart,* supra, at 49.

11. It has been held by the Supreme Court of the United States that the title of the riparian owner to the soil beneath navigable waters is a question to be determined by the local law of the state in which the same is situated. The Federal government has not had the power to convey land beneath tide waters within the borders of a state after the admission of such state into the union. *State ex rel. Rice v Stewart,* supra, at 49.

12. The courts in Mississippi have held in the cases of *Martin v O'Brien,* 34 M 21 (1857); *Money v Wood,* 152 M 17, 118 So. 357 (1928); *Rouse v Saucier's Heirs,* 166 M 704, 146 So. 291 (1933) that the State holds the title to the land beneath tide water, as trustee for the people, subject only to the paramount right of the United States to control commerce and navigation.

13. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States but were reserved to the states respectively. The new states have the same rights, sovereignty and jurisdiction over the lands under navigable waters as the original states. *Pollard's Lessee v Hagan,* 44 U.S. (3 How.) 230 (1845).

13. It is the settled law of this country that the owner-

ship of and dominion and sovereignty over lands covered by tidewaters, within the limits of the several states, belong to the respective states within which they are found with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters. *The Illinois Central Railroad Company v State of Illinois,* 146 U.S. 435 (1892).

15. Each state has dealt with the lands under the tidewaters within its borders according to its own views of justice and policy and it is apparent that the United States Supreme Court has clearly recognized that the individual states have complete sovereignty, jurisdiction and control over their tidelands, subject only to the paramount right of the United States to control commerce and navigation between the several states or between the United States and other nations. *Shively v Bowlby,* 152 U.S. 1, 38 L.Ed. 341 (1892).

16. The State owns in fee simple all lands that are flowed by the tide up to the high water line or mark. For the purposes of determining State-owned tidelands, the "high-water line or mark" is the line formed by the intersection of the tidal plane of the mean high tide with the shore. *O'Neil v State Highway Department,* 50 N.J. 307, 235 A.2d 9 (1967).

17. Tideland extends to the high water mark. This does not mean a physical mark made upon the ground by the waters. It means the line of high water as determined by the course of the tides. By the common law, the shore is confined to the flux and reflux of the sea at ordinary tides. It is the land over which the the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always in-

tended where the common law prevails. In order to include the lands thus covered by the ebb and flow of the tides, it is necessary to take the mean high tide line, which is neither the spring tide nor the neap tide, but a mean of all the high tides. Mean high water at any place is the average height of all the high waters at a particular place over a considerable period of time. In order to ascertain the mean high tide line with requisite certainty in fixing the boundary of valuable tidelands, such as those here in question appear to be, an average of 18.6 years (the epoch then in effect) should be determined as near as possible. *Borax Consolidated Ltd. v Los Angeles,* 296 U.S. 15 (1935). It is generally recognized by the courts that the National Ocean Survey is the authority in this area and the data compiled by that organization is the proper data for a determination of the elevation of the tidal plane or where the tidelands meet the uplands. *O'Neill v State Highway Department,* 50 N.J. 307, 235 A.2d 1, 11-12 (1967); Maloney and Ausness, *Coastal Boundaries,* 53 N.C. Law Rev. 185, 194, 202-206 (1974).

19. It is settled in this country that title to the tidelands became vested in the individual states upon their admission into the Union to be governed and controlled according to the laws of each state wherein the tidelands are located. The soils under tidewaters within the original states were reserved to them respectively, and the states since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original states possessed. *Borax Consolidated Ltd. v Los Angeles,* supra.

20. Upon the admission of the States into the Union the property between the high tide meander line and the same line on the opposite side of a tide water stream became vested in Mississippi as trustee. This title of the State is

held for purposes chief among which is that of commerce and navigation. For purposes of navigation the title of the State is subservient to such regulations as may be constitutionally made by the national government. Neither the State nor the federal government can validly convey title in fee simple to an area such as above mentioned to private owners for private purposes. *Rouse v. Saucier's Heirs,* supra, at 292. It should be noted that the property the subject of the *Rouse* case is located on the Wolfe River near the Bay of St. Louis and is not too distant from the property the subject of this lawsuit.

21. The Public Trust Doctrine in Mississippi has always held that the State of Mississippi is the absolute owner of the soil and of the minerals therein contained and in the beds of all its shores, arms and inlets of the sea wherever the tide ebbs and flows, as trustee for the people of the state; and, as trustee, cannot convey the title to the land beneath such waters below the mean high water mark in fee simple.

22. The shores of the sea below high water mark belong to the State as trustee for the public and may, by grant, become private property, or the subject of an exclusive private right; and the right of the owners of the land bounded by the sea extends no further than to high water mark. *Martin v. O'Brien,* supra.

23. The State of Mississippi is the absolute owner of the title of the soil, and of the minerals therein contained, in the beds of all of its shores, arms and inlets of the sea, wherever the tide ebbs and flows, as trustee for the people of the State, and subject only to the paramount right of the United States to control commerce and navigation, with the consequent right to use or dispose of any portion thereof, when that can be done without impairment of the interest of the public in the waters, subject to the para-

mount right above mentioned, and not inconsistent with Section 81 of the Constitution of the State of Mississippi. *State ex rel. Rice v Stewart,* supra, at 50.

24. Any deed issued by an official of the State of Mississippi, where that official had no authority of law to convey property in question, is void and the individual exercising the authority entirely lacked the power to do so. *Huber v Freret,* 138 Miss. 238, 103 So. 3 (1925).

25. Since the *Treuting* case, supra, was an exception to the general rule which prohibits the sale by a trustee to anyone for private purpose, the case was restricted in its terms to the circumstances there existing which arose from special legislation directed to a particular area. The sale was valid only because the public purpose resulted which was clearly paramount to the public interest. *International Paper Company of Moss Point v Mississippi State Highway Department,* 271 So.2d 399 (Miss. 1972).

26. The judicial department is without power to grant title to trust property to private individuals because tide lands may only be disposed of as authorized by the Legislature within the narrow confines of the holding in *Treuting v Bridge and Park Com'n of City of Biloxi,* supra. Possession, absent such authority, did not ripen into title. *State of Mississippi, et al. v Hanson Properties, Inc.,* 371 So.2d 871 (1979).

The former decisions of the Mississippi Supreme Court as to the ownership of the soil beneath tide waters is in accord with the decisions of courts in this country where the common law prevails. *State ex rel: Rice v Stewart,* supra, at 49.

27. The assessment and payment of taxes on the land the subject of the lawsuit for a period in excess of a half

century does not estop the State from contending that its patents, as they concern any of the property below the mean high water line, are invalid. *International Paper Company of Moss Point v Mississippi State Highway Department,* supra, at 400.

28. The change in characteristics of land during the passage of time did not displace the trust imposed upon the State for the public. *International Paper Company of Moss Point v Mississippi State Highway Department,* supra, at 399.

29. Land may be legally, although not physically, under water, as where it was formerly under water and has been filled in by some person or persons without authority. *Weinberger v Passaic,* 86 A. 59, 84 N.J. Law 149 (1913).

30. Since land below the mean high water mark belongs to the State in its capacity as trustee under the Public Trust Doctrine, to allow the adjacent owner to reclaim this land would be tantamount to allowing him to take state land. *Board of Trustees of the Internal Improvement Trust Fund v Medeira Beach Nominee, Inc.,* 272 So.2d 209, 212 (Fla. Dist. App. 1973).

31. A riparian owner cannot obtain title to submerged lands by filling. *Barney v Keokuk,* 94 U.S. 324 (1876); *United States v Turner,* 175 F.2d 644 (5th Cir.), cert. den. 388 U.S. 851 (1949).

32. Private interests cannot create "fast land" from waterbottoms which are subject to the public right of navigation. *Oyster Co. v Briggs,* 229 U.S. 82, 57 L.Ed. 1083, 33 S.Ct. 679 (1913).

33. If a volume or expanse of navigable water be increased artificially, the public right is correspondingly increased and the title will vest in the state by dedication. *Village of Pewaukee v Savoy,* 79 N.W. 436 (1899).

34. Mississippi courts have long recognized a distinction between fresh water streams and tidelands relative to ownership of submerged lands. Riparian owners of fresh water streams, whether navigable or not, own to the center of the fresh water stream. With respect to those submerged lands subject to the ebb and flow of the tide, the State of Mississippi owns those lands and holds them in trust for all the people, wherever the tide ebbs and flows and regardless of actual navigability. *State ex rel. Rice v Stewart,* 185 So. 247 (1939).

A decree shall be submitted by the solicitors for the State of Mississippi and Saga Petroleum according to Chancery Rules, confirming title as set forth in the above findings of fact and conclusions of law and defining the interests of the parties.

Costs of this proceeding shall be assessed to the complainants.

The above and foregoing Findings and Ruling of the Court is hereby made a part of the record in this cause in accordance with the rules of Chancery practice.

DONE AND ENTERED, this 28th day of April 1982.

/s/ Wm. L. Stewart
WILLIAM L. STEWART, Chancellor

[Metes and bounds descriptions of the properties involved, attached to these findings and ruling, as well a plat of certain properties, have been omitted]

IN THE
CHANCERY COURT
OF HANCOCK COUNTY, MISSISSIPPI

CINQUE BAMBINI PARTNERSHIP	COMPLAINANTS
VS.	CAUSE NO. 14,178
STATE OF MISSISSIPPI, ET AL.	DEFENDANTS

FINAL JUDGMENT AND DECREE

This cause having come on to be heard on Bill of Complaint to Quiet and Confirm Title filed herein by the Complainants and Answers thereto by separate Defendants, Cross Bill of Defendant State of Mississippi, and Motion to Dismiss or Abate the Cross Bill, and all parties being before the Court after proper service of process and upon extensive oral and documentary evidence being duly heard in open Court at the trial of this cause, said trial lasting approximately sixteen (16) days, and the Court having heard and considered all the evidence, arguments, briefs and proposed findings of fact and conclusions of law submitted by the respective parties through counsel, the Court being fully advised in the premises and thereafter having filed its FINDINGS AND RULING OF THE COURT, which includes the CONCLUSIONS OF LAW and Findings of Fact, and based on said FINDINGS AND RULINGS OF THE COURT;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Court having heretofore filed its FINDINGS AND RULING OF THE COURT, which includes the CONCLUSIONS OF LAW and Findings of Fact and the Opinion of the Court in this matter pursuant to the

statute, the same is hereby annexed to this decree in its entirety and is incorporated in its entirety as a part of this decree including all addendums appurtenant thereto and is made a part of this decree as though actually embraced herein in its entirety.

2. Complainant, Cinque Bambini Partnership, is the owner of the surface and an undivided one-half (½) mineral interest in those lands described as being vested in the Cinque Bambini Partnership in the FINDINGS AND RULING OF THE COURT and CONCLUSIONS OF LAW which is attached hereto and made a part hereof for all purposes, subject to the oil, gas and mineral leases, easements, right-of-ways, and pooling declarations reflected by public records;

3. Complainant, Harry B. Kelleher, is the owner of the surface and an undivided one-half (½) mineral interest in those lands described as being vested in Harry B. Kelleher in the FINDINGS AND RULING OF THE COURT and CONCLUSIONS OF LAW, which is attached hereto and made a part hereof for all purposes, subject to the oil, gas and mineral leases, easements, right-of-ways, and pooling declarations reflected by public records;

4. Complainants, Carroll W. Allen, Jr. and Lydia Carroll Hamilton Allen, each own and undivided one-fourth (¼) mineral interest in those lands described as being vested in Carroll W. Allen, Jr. and Lydia Carroll Hamilton Allen in the FINDINGS AND RULING OF THE COURT and CONCLUSION OF LAW, which is attached hereto and made a part hereof for all purposes, subject to the oil, gas and mineral leases, easements, right-of ways, and pooling declarations reflected by public records;

5. The Mississippi Power Company is the owner of the surface interest described in the FINDINGS AND RULING OF THE COURT and CONCLUSIONS OF LAW which is attached hereto and made a part hereof for all purposes;

6. Defendant, State of Mississippi, is vested with title to those lands below the mean high tide line and subject to the ebb and flow of the tide described as being vested in the State of Mississippi in the FINDINGS AND RULING OF THE COURT and CONCLUSIONS OF LAW which is attached hereto and made a part hereof for all purposes, subject to oil, gas and mineral leases in favor of Saga Petroleum U.S. Inc. and assignments thereof, and pooling declarations, all as reflected by public records;

7. The Cross Bill of the Defendant, State of Mississippi, is hereby dismissed for the reasons set forth in the FINDINGS AND RULING OF THE COURT and CONCLUSIONS OF LAW.

8. The interests of the respective parties, as declared and set forth in this FINAL JUDGMENT AND DECREE, are herby forever quieted and confirmed against any and all claims or demands by any persons and all persons are hereby enjoined and restrained from asserting any claim, in anywise, contrary to the respective interests herein specifically confirmed and set forth as being vested in the parties hereto.

9.The Court in a previous Order of Continuance granted in this cause on the 18th day of March, 1981, ordered that "the lessee oil and gas companies which are now escrowing funds owed to the royalty owners for oil and/or gas production from the subject lands pay from and after February 20, 1981 interest at the highest rate available at a

federally insured institution until the Court enters its final decree herein"; and that "the actual rate of interest to be paid shall be determined at the appropriate time by order of the Court either by agreement of the affected parties or after notice to all parties and a hearing thereon"; and that "such companies shall then pay the interest along with the principal in accordance with the Court's decree". The Court now determines that the aforegoing Order shall remain in full force and effect and that division of said money and the interest due thereon is a matter of accounting only and will be determined by this Court at such time and in such manner as may be agreed to by the parties with the approval of the Court.

10. A copy of this FINAL JUDGMENT AND DECREE, together with the Opinion of the Court and its FINDINGS AND RULING OF THE COURT and CONCLUSIONS OF LAW shall be entered by the Chancery Clerk in the Final Record of Hancock County, Mississippi, and appropriate notation made in the land records wherever applicable as notice to all persons of the ownership of the interests as designated herein.

11. All costs of this proceeding are assessed pro rata among the Complainants, for which let execution issue.

IT IS SO ORDERED, ADJUDGED AND DECREED this 16th day of September, 1982.

William L. Stewart

CHANCELLOR

APPENDIX C

RULE 28.1 LISTING
PHILLIPS PETROLEUM COMPANY DIRECT AND INDIRECT SUBSIDIARIES AND AFFILIATES OWNED LESS THAN 100%*

ALESKA PIPELINE SERVICE COMPANY

ARCTIC LNG TRANSPORTATION COMPANY

CANADA WESTERN CORDAGE COMPANY, LIMITED

CANYON REEF CARRIERS, INC.

CHISHOLM PIPELINE COMPANY

COCHIN REFINERIES LIMITED

COLONIAL PIPELINE COMPANY

DIXIE PIPELINE COMPANY

EAST TEXAS SALT WATER DISPOSAL COMPANY

EXPLORER PIPELINE COMPANY

GREAT YARMOUTH PORT LABOUR COMPANY LIMITED

HEAT TRANSFER RESEARCH, INC.

IRANIAN MARINE INTERNATIONAL OIL COMPANY – IMINOCO

KENAI LNG CORPORATION

LONG BEACH OIL DEVELOPMENT COMPANY

MULTINATIONAL GAS AND PETROCHEMICAL SERVICES LIMITED

NORLAND GMBH FUR GRUNDBESITZ UND INDUSTRIEANLAGEN

NORPIPE A.S

NORPIPE PETROLEUM UK LIMITED

NORSEA GAS A/S

NORSEA GAS GMBH

NORSEA PIPELINE LIMITED

OIL INSURANCE LIMITED (NEW)

PAPAGO CHEMICALS, INC.

PHILLIPS CARBON BLACK COMPANY (PROPRIETARY) LIMITED

PHILLIPS CARBON BLACK ITALIANA S.P.A.

PHILLIPS CARBON BLACK LIMITED

PHILLIPS EXTRUDED PRODUCTS – LES PRODUITS EXTRUDES PHILLIPS

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PHILLIPS PETROLEUM INTERNATIONAL S.P.A.

PHILLIPS PETROLEUM SINGAPORE CHEMICALS (PRIVATE) LIMITED

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THE SALK INSTITUTE BIOTECHNOLOGY/
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VENEZOIL, C.A.

WALTON INSURANCE LIMITED

WESTERN DESERT OPERATING PETROLEUM
COMPANY (WEPCO)

WHITE RIVER SHALE OIL CORPORATION

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*Does not include companies required to issue one or more shares to directors or officers of Phillips Petroleum Company.

Supreme Court, U.S.
FILED
JAN 22 1987
JOSEPH F. SPANIOL, JR.
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(3)

No. 86-870

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY, and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM U.S. INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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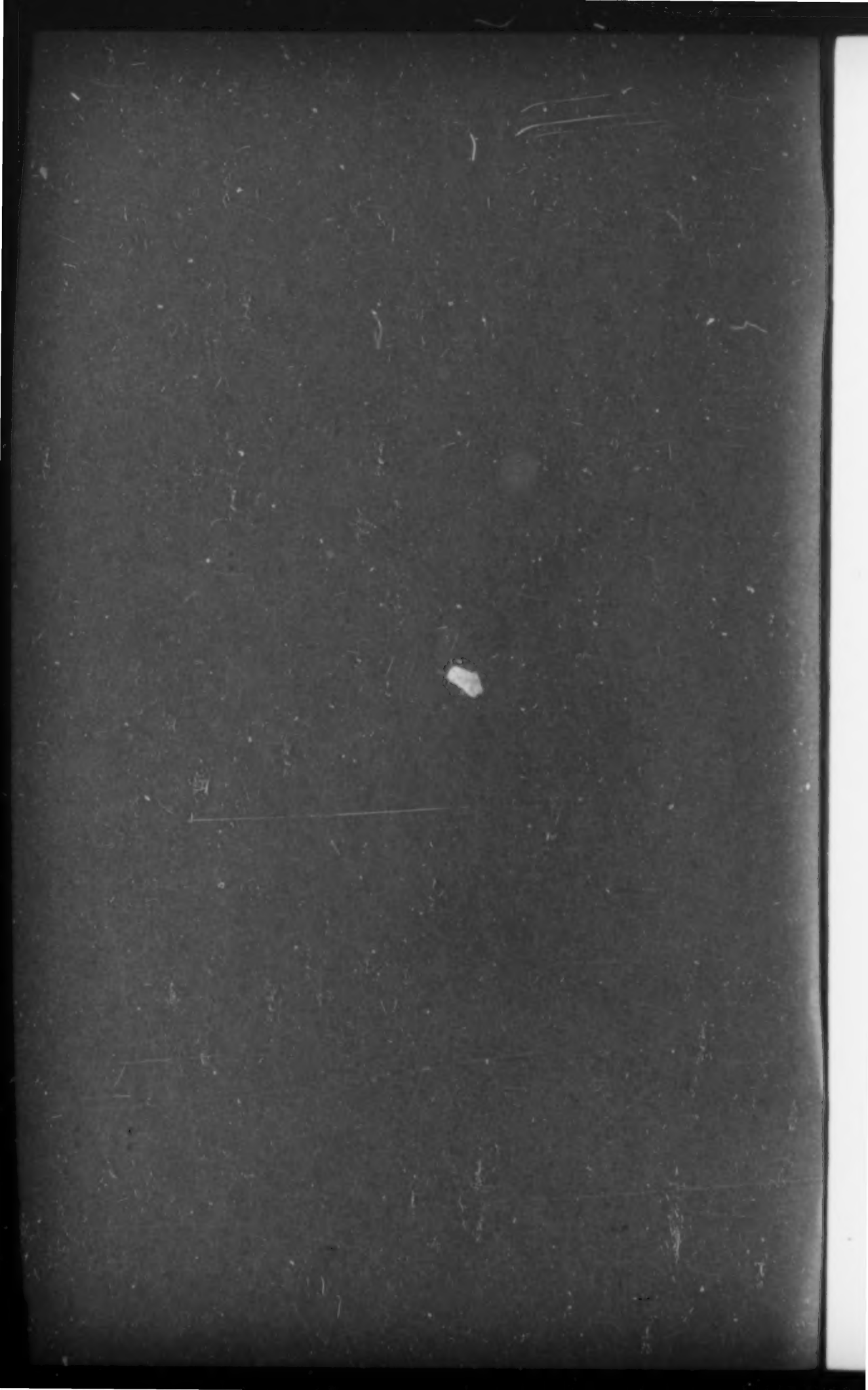

QUESTIONS PRESENTED

I. CAN THE EQUAL FOOTING DOCTRINE BE APPLIED TO LIMIT RETROACTIVELY THE SCOPE OF A STATE'S PUBLIC TRUST LANDS?

II. DOES THE PUBLIC TRUST DOCTRINE INCLUDE TIDAL WETLANDS WITHIN THE STATES' PUBLIC TRUST LANDS?

III. DOES THE EXISTENCE OF OPPOSING PRIVATE INTERESTS AFFECT THE VITALITY OF THE PUBLIC TRUST DOCTRINE?

RULE 28.1 LISTING

Saga Petroleum U.S. Inc. is a wholly owned subsidiary of Volvo North America Corporation. Volvo North America Corporation is a wholly owned subsidiary of A.B. Volvo. Saga Petroleum U.S. Inc. is a partner in Saga Products Company, a general partnership. Saga Petroleum U.S. Inc. has no subsidiaries.

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STATEMENT OF THE CASE

This action involves a question as to the ownership of approximately 2,400 acres of land in Mississippi. This land, which lies near the state's gulf coast, is subject to tidal influence. The Petitioners claim ownership of the land by virtue of certain Spanish grants. The Respondents argue that the property is embraced within the State of Mississippi's public trust lands.

The Supreme Court of Mississippi concluded that the Spanish grants had no effect, and that at the time of achieving statehood, the State of Mississippi obtained title to all lands subject to the ebb and flow of the tide up to the then mean high water level. *Cinque Bambini Partnership v. Mississippi*, 491 So. 2d 508 (Miss. 1986). The Petitioners subsequently filed a petition for a writ of certiorari with the Supreme Court of the United States, arguing that the equal footing doctrine mandates a different result than that reached by the Supreme Court of Mississippi, and that the public trust lands properly include only land beneath navigable water (*See* Phillips Petroleum Co. and Cinque Bambini Partnership's Petition

for a Writ of Certiorari to the Supreme Court of Mississippi; hereinafter "Petition").

ARGUMENT

I. THE PETITION SHOULD BE DENIED SINCE THE SUPREME COURT OF MISSISSIPPI PROPERLY RECOGNIZED THAT IN THE PRESENT CASE, THE EQUAL FOOTING DOCTRINE OPERATED SOLELY TO GRANT MISSISSIPPI THE SAME RIGHTS TO PUBLIC TRUST LANDS THAT WERE OBTAINED BY THE THIRTEEN ORIGINAL STATES AS AN ATTRIBUTE OF SOVEREIGNTY.

The Supreme Court of Mississippi rendered its decision in the present case with a complete appreciation of the "equal footing doctrine" and its impact on Mississippi's public trust lands. That court recognized that following the accession of the original thirteen states to the sovereign rights of dominion over navigable waters and tidelands, similar rights were held in trust by the United States, to be passed to each new state upon its entry into the Union so as to give it "equal footing" with its forbears. *Cinque Bambini Partnership v. Mississippi*, *supra*, 491 So. 2d at 512.

In considering the identity of the public trust property obtained by Mississippi when it joined the Union in 1817, the court applied the equal footing doctrine and

recognized that Mississippi, like the original thirteen states, had dominion over such lands as were subject to the ebb and flow of the tides at that time, as called for by the controlling authorities of that era. *Id*. at 513-14. Having ascertained the scope of Mississippi's public trust land, as fixed in 1817, the Supreme Court of Mississippi determined that the equal footing doctrine had served its purpose, and had no further role in shaping the limits of the state's public trust land. *Id*. at 512. This conclusion finds support from decisions of the Supreme Court of the United States in the cases of *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 376 (1977) and *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), which embrace the rule that the function of the equal footing doctrine ends immediately after a state is admitted to the Union.

Without refuting the soundness of the Supreme Court of Mississippi's traditional application of the equal footing doctrine, the Petitioners argue that the doctrine should be given an expanded role, operating to detach retroactively

certain public trust lands that were acquired by states upon their entry to the Union. In particular, they argue that Mississippi's trust lands should now be limited by application of the doctrine to ensure that the state's rights in public trust lands are not greater than those of the states that subsequently entered the Union. Thus, the Petitioners would have the doctrine serve to place Mississippi on an equal footing, not with the original thirteen states as traditionally called for, but with the states that followed it into the Union.

As discussed in Section II, *infra*, the Petitioners' claim that the rights of states which entered the Union when the "ebb and flow" test was the sole gauge for the scope of public trust lands are somehow greater than the rights of states which subsequently entered the Union when the test of navigability was supposedly the only test for the trust lands is unsupported by case law or other authority. Yet, even if it were true, the Petitioners' equal footing argument would be groundless. The lack of merit of the argument is revealed by the dearth of

authority mustered by the Petitioners in its support. In short, there is no viable authority indicating that the doctrine of equal footing was developed to restrict any state's rights to public trust lands after the state has obtained the land upon entry to the Union. Clearly, the phrase "equal footing" cannot be given too much emphasis in analyzing the nature of the doctrine. As new states entered the Union following the revolution, they varied widely in terms of their size and geographic features. Thus, the quantum of public trust land held by each state varied accordingly. There is, therefore, an inherent "imbalance" as to the quantity of lands obtained by the states in this manner. This result obtains regardless of whether the "ebb and flow" test or a "navigability" test is used to determine the identity of each state's public trust lands.

In support of their request for consideration of this issue, the Petitioners cite *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 220 (1845), which is said to demonstrate that "this Court has deemed efforts to limit the

scope of the state-owned public trust land of such extraordinary importance as to warrant plenary consideration" (Petition at 9-10). Plainly, this authority is not relevant to the issue at hand. It seems that the only parties who seek to limit the scope of Mississippi's public trust land in this action are the Petitioners themselves; the Supreme Court of Mississippi clearly has not done so.

Since the Petitioners' contention is devoid of supporting authority, and the Supreme Court of Mississippi has applied the equal footing doctrine in a manner consistent with the decisions of this Court, the petition should be denied.

II. THE PETITION SHOULD BE DENIED SINCE THE DECISION OF THE SUPREME COURT OF MISSISSIPPI IS CONSISTENT WITH THIS COURT'S RULING THAT THE PUBLIC TRUST LAND OF THE STATES INCLUDES TIDELANDS, WITHOUT REGARD TO THE ISSUE OF NAVIGABILITY.

The decision of the Supreme Court of Mississippi in this case rests upon a sound interpretation of the scope of the public trust land that devolved upon the State of Mississippi when it entered the Union. It is well recognized that the courts of this nation adopted the English common-law doctrine that reserved to the sovereign the right to tidal waters and the lands beneath them. *See, e.g., Illinois Central Railroad v. Illinois, supra*, 146 U.S. at 435-36; *Weber v. Harbor Commissioners*, 85 U.S. (18 Wall.) 57 (1873). Pursuant to this doctrine, the United States held the nation's tidewaters in trust for the future states, dominion over such property passing to each state upon its admission to the Union. *See Weber v. Harbor Commissioners, supra*; *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867); *Pollard's Lessee v. Hagan, supra*. The identity of the land included within the public trust was

established at the time that the states achieved statehood. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., supra*, 429 U.S. at 376; *United States v. Utah*, 283 U.S. 64, 75 (1931); *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471, 477 (1850). Thus, in 1817, when the State of Mississippi entered the Union, its public trust lands were identified and fixed. At that time, American courts followed the English common-law rule which defined the sovereign's trust to include land subject to the ebb and flow of the tide. *See Pollard's Lessee v. Hagan, supra*.

In light of this authority, the Supreme Court of Mississippi properly concluded that the state's trust lands included those lying under coastal wetlands that are subject to tidal action. *See Cinque Bambini Partnership v. Mississippi, supra*.

The Petitioners argue that decisions reached by this Court subsequent to Mississippi's statehood have completely supplanted the earlier "ebb and flow" test with a "navigability in fact" test. In support of this contention, the Petitioners cite authorities such as *Montana v. United*

States, 450 U.S. 544 (1981); *Illinois Central Railroad v. Illinois*, *supra*, and *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842), which undeniably rely on the factor of navigability to ascertain questions regarding the scope of public trust land in certain situations.

However, the Petitioners fail to cite any authority, predating or contemporaneous with Mississippi's entry into the Union in 1817, that sets forth a navigability criterion for delineating public trust lands. Nor have the Petitioners provided any authority indicating that the "navigability" test was intended to divest from certain states land already held under the "ebb and flow" test. Indeed, the Petitioners simply fail to address the problems that necessarily arise from a construction of the public trust doctrine that operates to take from the states vast quantities of land already vested in them when they became states.

Despite the Petitioners' argument, the proper role of the factor of navigability can only be appreciated when viewed from the perspective of the courts that fashioned the equal footing doctrine (discussed *supra*, in Section I).

Plainly, the public trust doctrine, as originally formulated, offered little to the inland states with no tidal waters. The development of a navigability test, which coincided with the development of the interior of the nation, represents an expansion from the original "ebb and flow" test to provide the inland states with similar benefits of sovereignty already enjoyed by coastal states. *See Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, *supra*, 429 U.S. at 375 (citing *Barney v. Keokuk*, 94 U.S. 324, 338 (1877)).

Despite the expanded definition of public trust lands, the navigability analysis of the scope of public trust lands has not entirely replaced the "ebb and flow" test. The Petitioners suggest that, by virtue of the decisions in cases such as *The Propeller Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851) and *Illinois Central Railroad v. Illinois*, *supra*, this Court rejected the "historical misconception" that the "public trust doctrine encompassed 'tidewaters' or lands that are subject to the 'ebb and flow of the tide,' all without regard to navigability" (Petition

at 15). Nevertheless, over forty years after the *Illinois Central Railroad* decision, this Court reiterated the validity of the ebb and flow test.

In the case of *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, *rehearing denied*, 296 U.S. 664 (1933), this Court addressed the issue of the ownership of certain tidal lands lying on the coast of California. One party to the suit claimed title to the land by way of a patent issued by the United States. The other party claimed title through a legislative grant by the state. In determining the respective rights of the parties, this Court considered the public trust doctrine, and stated that "[t]he soils under tidewaters within the original states were reserved to them respectively, and the states since admitted to the Union have the same sovereignty and jurisdiction in relation to such land within their borders as the original states possessed." 296 U.S. at 15.

Having recognized the superior rights of the State of California in tidelands by reason of the public trust doctrine, the Supreme Court concluded that the issue of

ownership of the land could be resolved by answering one question: "Was it upland, which the United States could patent, or tideland, which it could not?" *Id.* at 18-19.

In determining the boundary of the tidelands, the Supreme Court looked to the common-law "ebb and flow" test, the same test which was relied upon by the Supreme Court of Mississippi in the present case. *Id.* at 22-23. The Supreme Court of the United States did not consider the factor of navigability at all.

A similar reaffirmation of the inclusion of tidelands in the public trust may be found in this Court's decision in the case of *United States v. California*, 332 U.S. 19, *rehearing denied*, 332 U.S. 787 (1947). Although in that case, this Court refused to expand the scope of the public trust to include a belt of submerged land lying offshore, it did acknowledge that the soils lying beneath inland navigable waters *and* tidelands were within the trust. 332 U.S. at 36.

It should be noted that the authorities espousing the navigability analysis of the scope of the public trust

lands, such as *Montana v. United States*, *supra*; *Oklahoma v. Texas*, 258 U.S. 574 (1922); *Scott v. Lattig*, 227 U.S. 229 (1913); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Central Railroad v. Illinois*, *supra*, and others, specifically involved inland waters and thus understandably do not utilize factors of analysis more relevant to coastal areas.

The Petitioners' misplaced reliance on the issue of navigability arises in part from their misunderstanding of the relationship between the federal government's reserved rights in the public trust lands and the scope of the trust. The Petitioners stress the importance of the application of the "navigability in fact test" in order to respect the constitutional concern underlying the public trust doctrine that it be "deemed subject to the paramount power of Congress to regulate the commerce and navigability of such waters" (Petition at 12-13).

It is well established that the states' rights in public trust lands are subject to the paramount rights of Congress to regulate commerce over such lands. *See*, *e.g.*,

Illinois Central Railroad v. Illinois, supra; *Weber v. Harbor Commissioners, supra*. The federal interest in submerged property beneath navigable waters, known as the "navigational servitude," is manifested in such legislation as the Rivers and Harbors Act of 1899, 33 *U.S.C.S.* §§ 401 et seq. (Law. Co-op. 1980 & Supp. 1986). *See also Coastal Petroleum Co. v. United States*, 524 F.2d 1206, 1209 (Ct. Cl. 1976), *cert. denied*, 449 U.S. 1011 (1980), *cert. denied*, 456 U.S. 915 (1982). As a superior interest, the navigational servitude can hardly be said to be limited or otherwise affected by the inclusion or exclusion of non-navigable tidal waters in the public trust lands. This point is well illustrated by the following passage from the case of *United States v. Appalachian Power Co.*, 311 U.S. 377, 426-27 (1940):

> [I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . In truth the authority of the United States is the regulation of commerce on its waters. Navigability . . . is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control. . . . [T]he authority is as broad as the

needs of commerce.

Thus, the Petitioners' suggestion that the federal rights in the lands in question will not be "respected" under the Supreme Court of Mississippi's decision in the present case is utterly without merit.

Nevertheless, federal case law pertaining to the federal interest in submerged lands does illuminate the issue at hand in one respect. A number of courts have held that "navigable waters," the primary factor in ascertaining the scope of the federal interest in submerged lands, extend from coastal ocean areas up into tidal wetlands that are not actually "navigable in fact." *See, e.g., United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975) (holding that the scope of the federal servitude is defined by the ebb and flow of the tide and therefore extends to include tidal marshes); *United States v. Cannon*, 363 F. Supp. 1045 (D. Del. 1973); *United States v. Lewis*, 355 F. Supp. 1132 (S.D. Ga. 1973); *see also United States v. Weisman*, 489 F. Supp. 1331, 1340 (M.D. Fla. 1980) (in considering whether tidal

creeks are navigable, the court held that "the legal status of a determination of navigability applies laterally over the entire surface of the water body and extends shoreward to the mean high water mark"; where a tidal creek lies adjacent to a navigable river, "no inquiry is required here concerning the potential of these tidal creeks for commerce or transportation").

Thus, it is apparent that, even if the scope of public trust lands is to be determined by the criterion of navigability of waters, federal law recognizes that navigable waters extend into tidal wetlands that are not navigable in fact. The application of a navigability criterion in the present case would not alter the rights of the parties herein, as established by the Supreme Court of Mississippi, since the property in question lies under tidal wetlands, and since it would fall within the public trust under either an "ebb and flow" test or a navigable waters test.

In ascertaining the scope of Mississippi's public trust lands, the Supreme Court of Mississippi concluded that the trust included tidal wetlands. This ruling is in accord

with the authorities controlling when Mississippi became a state as well as with more recent decisions of the Supreme Court of the United States. Furthermore, the Supreme Court of Mississippi's decision mirrors that rendered by the Supreme Court of New Jersey in the case of *City of Newark v. Natural Resources Council*, 82 N.J. 530, 414 A.2d 1304 (sovereign ownership based on tidal flow, irrespective of navigability, has been and continues to be the rule in New Jersey), *cert. denied*, 449 U.S. 983 (1980). In light of the overwhelming support for the Supreme Court of Mississippi's approach in this case, and the corresponding lack of authority for that of the Petitioners, the petition should be denied.

III. THE EXISTENCE OF COMPETING INTERESTS CANNOT JUSTIFY THE ABANDONMENT OF THE PUBLIC'S RIGHTS UNDER THE PUBLIC TRUST DOCTRINE.

As the Mississippi Supreme Court stated, "great public interests and neither insignificant nor illegitimate private interests are present and in conflict, [nevertheless] this in the end is a title suit." *Cinque Bambini Partnership v. Mississippi*, *supra*, 491 So. 2d at 510. These conflicts are not irreconcilable, as evidenced by the court's opinion.

The existence of the public trust ownership is a fact which the alleged purchaser of tidelands may be expected to weigh when attempting to purchase such lands, and, when the state exercises its long-held title to such lands, it has hardly frustrated the justifiable expectations of the alleged owners. Nor is it reasonable for purported owners to complain that public trust rights in these lands have largely lain dormant for many years.

The principal objects of public trust ownership are the maintenance of navigation, ports, free passage, commerce, fishing, sand and stones, seaweed and shells,

recreation, conservation and aesthetics, and other important public interests. When common-law principles within the state established the existence of such ownership in 1817, alleged purchasers of public trust lands were subject to the exercise of the trust ownership at any future date.

The coastal zone, with its biological and mineral resources and recreational and aesthetic values, is not a limitless resource. It must be protected and used in a manner that will ensure that resources are not misallocated. Thus it is clear that the general public, as owners of the tidelands pursuant to the public trust doctrine, has a vital interest in the coastal zone. Although the rights of the general public may be in conflict with those of private littoral owners, such conflict is capable of just resolution by the courts, as amply demonstrated by the decision of the Mississippi Supreme Court in the present case.

CONCLUSION

The Supreme Court of Mississippi's decision is consistent with this Court's rulings regarding the public trust and equal footing doctrines, and since no conflict between the circuits is presented by this case, the Petition for Writ of Certiorari should be denied.

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In The Supreme Court of the United States

October Term, 1986

PHILLIPS PETROLEUM COMPANY, AND CINQUE BAMBINI PARTNERSHIP

PETITIONERS

VERSUS

STATE OF MISSISSIPPI AND SAGA PETROLEUM U.S., INC.

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QUESTION PRESENTED

Whether at the time of Mississippi's statehood in 1817, the lands under the non-navigable but tidally influenced inland waters were conveyed by the United States to Mississippi as part of the state-owned public trust.

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NO. 86-870

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY, and
CINQUE BAMBINI PARTNERSHIP,

Petitioners,

vs.

STATE OF MISSISSIPPI and
SAGA PETROLEUM U.S., INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Mississippi, as modified on rehearing, is reported as Cinque Bambini Partnership, et al v. State of Mississippi, et al., 491 So.2d 508 (1986). A copy of the opinion is before the Court in Petitioners' Appendix A to Petition for Writ of Certiorari to the Supreme Court of Mississippi Pet. App. 1a -26a.[1]

On Petition for Rehearing, Pet. App. 28a, the request for rehearing was denied; however, the language in the opinion was changed to include on Pet. App. 24a "(to the extent that each lake was not naturally within the ebb and flow of the tide on the date the dredging commenced)."

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[1] For the convenience of the Court, all references to Petitioners' Appendix will be listed as "Pet. App." and all references to Respondent's Appendix will be listed as "Res. App."

The Findings and Rulings of the Chancery Court of Hancock County, Mississippi, are not officially reported. A copy of this opinion with the Final Judgment and Decree is also before the Court in Petitioners' Appendix B to Petition for Writ of Certiorari to the Supreme Court of Mississippi at Pet. App. 29a-74a.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. §1257 (3). They fail to present sufficient facts and arguments upon which this Court should grant certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioners seek to invoke the provisions of the Constitution of the United States, Article IV, Section 3: the Act of March 1, 1817, 3 Stat. 348; and the Resolution of

December 10, 1817, 3 Stat. 472, 473. They also rely on section 49-27-5, Miss. Code Ann. (Supp. 1986).

STATEMENT OF THE CASE

A. Factual Background

In the decision at issue (Pet. App. 1a), the Mississippi Supreme Court held that certain tidelands in dispute located in Hancock County, Mississippi, belonged to the State as part of the state-owned public trust. Petitioners have posed the question to this Court whether the "lands under the non-navigable but tidally influenced inland waters were conveyed by the United States to Mississippi as part of the state-owned public trust."

The lawsuit arose following action by the Mississippi State Mineral Lease Commission in 1977 granting oil and gas leases to Saga Petroleum U.S., Inc. for an estimated 600 acres of tidelands in Hancock County. Such oil and gas leases made it clear that they covered only

lands subject to the ebb and flow of the tide and which were below the water mark of mean high tide. (Pet. App. 54a).

The Petitioner, Cinque Bambini Partnership, and other title holders filed suit in Hancock County Chancery Court claiming these state-owned tidelands to be part of 2400 acres owned by them, for the most part covered by federal patents issued to their predecessors-in-title under Acts of Congress of 1822 and 1830.

The acreage in dispute was approximately 140 acres consisting of 42 plus acres made up of the north branch of Bayou LaCroix and 11 small streams and inlets and 98 acres consisting of Bayou Enciente and Long Gar Bayou and adjacent Bambini uplands which were dredged out at the direction of the Cinque Bambini Partnership to make two deep lakes for their personal use. (Pet. App. 47a, 52a to 57a).

The dredging operation conducted by the Cinque Bambini contractor at their direction altered the original bed of Bayou Enceinte and Long Gar Bayou (Pet. App. 55a); obliterated and destroyed the original mean high water mark on the banks of Bayou Enceinte and Long Gar Bayou (Pet. App. 56a); and filled in the original entrance and channel of Bayou Enceinte, which was below mean high tide, to the exclusion of the ebb and flow of the tide. (Pet. App. 56a).

A new artificial channel was constructed for the mouth of Bayou Enciente which resulted in property originally owned by the Cinque Bambini Partnership being lowered below the level of mean high tide. (Pet. App. 56a).

The beds of the interior bayous, inlets, and steams which were within the property the subject of this lawsuit, "are below mean high tide and are subject to the ebb and flow of the tide." (Pet. App. 57a).

The Chancery Court of Hancock County held (Pet. App. 29a-74a), that all of the tidelands in dispute belonged to the State under the Public Trust Doctrine in accordance with the common law adopted by Mississippi. Included were the two lakes dredged out at the direction of the Cinque Bambini partnership from the state-owned bayous and associated tidelands together with the portion of the lakes dredged from the Bambini uplands.

Despite their stated acceptance of the summary of facts by the Mississippi Supreme Court, Petitioners persist in claiming unfair treatment by the court below of their "Spanish land grants." It therefore becomes necessary to point out the flaw in their argument.

The court below did not find it necessary to examine the authenticity of Petitioners' purported Spanish titles, but disposed of their contention (Pet. App. 18a, 19a) by citing

Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 225 11 L.Ed. 565, 572 (1845) in which this Court described in detail the history of the region formerly known as West Florida (in which the Cinque Bambini lands are located). The Court in Pollard stated unequivocably that the United States never acquired any part of West Florida from Spain and that there was never any treaty between the two countries which would require the United States to protect Spanish titles.

Petitioners cite Acts of Congress which they claim confirmed their titles. They complain that the Mississippi Supreme Court ignored such Acts of Congress and held instead that title to these tidelands was granted to the State of Mississippi at statehood in 1817.

Although there was no treaty between the United States and Spain covering this area and consequently no underlying international duty,

the United States adopted legislation appointing commissioners to investigate land claims of possible settlers in the region.

The claims of the Cinque Bambini predecessors (Pet. App. 39a) were not based on grants at all, but were merely claims based on settlement and occupation of the land prior to 1813. These claims are listed in the American State Papers, Public Lands, (Duff Green edition) Vol. 3 at 392-396, (Res. App. 1a-5a, infra) and Vol. 5 at 320-322 (1834) (Res. App. 6a-8a, infra) The claims of John J. Jourdan, Noel Jourdan and Pierre Carco were presented to the commissioners under an Act of Congress dated March 3, 1819, 3 Stat. 528. The American State Papers show that there were four claims. The John Joseph Jourdan Claim No. 23, the Pierre Carco Claim No. 25, and the Noel Jourdan Claim No. 28 (Res. App. 1a, infra)

appeared in the list of actual settlers in the district east of Pearl River "who have no claims derived from either the French, British, or Spanish Governments." However, since they were able to show settlement prior to April 15, 1813, they were each given as a "donation" under Section 3 of the Act of May 8, 1822, 3 Stat. 707, a tract of land of 640 acres [Noel Jourdan received 535 30/100 acres].

The additional John Joseph Jourdan Claim No. 8 (Res. App. 5a, infra) for 1000 arpents (acres) is the only one that had any connection with the Spanish authorities, and was merely a permit to settle in April, 1798. The claim had no survey of the boundaries, nor was it inhabited or cultivated. The commissioners rejected this claim because such a claim, it was noted, had been forfeited under the Spanish Law, and did not appear to be entitled to confirmation under any law of the United

States. Subsequently, under a supplemental Act of Congress dated May 24, 1828, 4 Stat. 299, this claim was revived as Claim No. 3 and after additional testimony was taken to show inhabitation and cultivation from 1802, the commissioners stated that the additional testimony did not supply full and satisfactory proof of inhabitation and cultivation, "yet as the inhabitation and cultivation were prior to 1803 we are of the opinion that they ought to be confirmed for a reasonable quantity." It was confirmed for 846 76/100 acres under Sec. 1 of the Act of May 28, 1830, 4 Stat. 408, which provided that such a claim may be eligible for a grant not to exceed twelve hundred and eighty acres to any one person.

A comparison of the Acts of Congress with the descriptions of the claims in the American State Papers (Res. App. 1a-8a, infra), shows beyond question that the Cinque Bambini land titles are not based on "pre-statehood Spanish

land grants, dated April 15, 1813," as claimed by Petitioners, but are merely donations of public lands by the United States Government based on actual settlement in the area prior to April 15, 1813. The term "public lands" does not include tidelands, Borax Consolidated, Ltd, v. City of Los Angeles, 296 U.S. 10, 17, 56 S.Ct. 23, 80 L.Ed. 9, 18 (1935).

It should be noted that the quotation on page 4 of Petitioner's brief that "Congress expressly recognized the grants as valid and complete titles, against any claim on the part of the United States, or right derived from the United States," has no application to the subject land claims but is derived from Sec. 1 of the Act of Congress of May 8, 1822, 3 Stat. 707, and refers to valid Spanish titles which Congress agreed were to be confirmed. Such confirmation was subject to the provision, Sec. 2, that it amounted "only to a relinquishment forever, on the part of the United States, of any claim whatever to

the tract of land so confirmed or granted." It did not convey tidelands even in the case of a valid Spanish title and certainly had no reference to the Cinque Bambini Partnership claims.

The evidence shows that the four federal patents (Res. App. 9a-15a, infra) were simply ordinary patents in the nature of quitclaim deeds conveying such interest as the Federal Government had in the lands and did not convey any tidelands.

The statement of Petitioners that the State of Mississippi showed no interest in "privately held wetlands" until 1973 is incorrect. The many cases cited by the Court below (Pet. App. 13a, 14a) evidence the constant interest of the State in defending the rights of the people in these trust lands, from Martin v. O'Brien, 34 Miss. 21 (1857) to the present case. The Court below correctly ruled (Pet. App. 24a, 25a) that the State is not estopped to assert its title

to and dominion over tidelands within the public trust.

B. The Mississippi Supreme Court Ruling

On appeal by the private claimants, the Mississippi Supreme Court affirmed the Chancery Court's ruling in part and reversed in part. Specifically, the Supreme Court held:

(1) "... [e]ffective upon statehood on March 1, 1817, we understand federal law to provide that the United States granted to the State of Mississippi in trust all lands, to which the United States then held title, including their mineral and other subsurface resources, subject to the ebb and flow of the tide below the then mean high water level -- regardless of whether the water courses were commercially navigable at the time of Mississippi's admission into the Union, regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea. Similarly granted were the beds and streams of all non-tidal waters which were navigable in fact in 1817. This act of creation consummated, the federal sovereign rested." (Pet. App. 15a)

(2) Forty-two (42) acres of tidelands covered by the north branch of Bayou LcCroix

and the eleven (11) small drainage streams belong to the State as part of the public trust, being subject to the ebb and flow of the tide in 1817. (Pet. App. 2a, 15a)

(3) The two lakes created by dredging for fill material used in construction of Interstate Highway I-10 belong to the State to the extent that each lake was naturally within the ebb and flow of the tide on the date the dredging commenced. (Pet. App. 2a, 24a). The artificially created tidelands remain in the record title holders, as the court found that the beds beneath these artificially created tidelands were not tidelands in 1817. (App. 2a, 24a).

The case was remanded to the Chancery Court for establishment on the ground and in the land records of the precise boundaries of the public trust properties today. (Pet. App. 26a, 27a)

The question presented by Petitioners uses the phrase "non-navigable" in connection with tidally influenced inland waters, thus showing a definite lack of understanding of colonial history, the English common law, the rights reserved by the thirteen original states at the formation of the Federal Government, the equal footing doctrine, and all the decisions in state and federal courts defining the accepted meaning of "navigable waters" at the time Mississippi entered the Union in 1817.

It is well settled that the definition of "navigable waters" is all waters subject to the ebb and flow of the tide to the mean high water mark, regardless of whether the water courses are commercially navigable, regardless of how insignificant the tidal influence, regardless of how shallow the water, and regardless of how far inland or remote from the sea.

Under this definition waters might be non-navigable in fact but they cannot be non-navigable as far as trust ownership goes.

From the above it is evident that at the time of statehood in 1817 all the lands under the influence of the tide were conveyed by the United States to Mississippi as part of the state-owned public trust whether they were navigable in fact or not.

REASONS FOR DENYING THE WRIT

1. The case below was correctly decided and is consistent with the prior decisions of this Court.

The decision of the Mississippi Supreme Court that the State owns all of its tidelands wherever the tide ebbs and flows to the mean high water mark is correct and is consistent with the prior decisions of this Court regarding ownership of tidelands. It fails to raise an equal footing problem of importance to all the states. The question presented has

also been well settled by the prior decisions of this Court. Respondents therefore respectfully request that this Court deny certiorari in this case.

The suggestion that the Mississippi decision will "create an imbalance in the equal footing doctrine" that favors coastal states over inland states is absurd. This shows a complete lack of understanding of the origin and purpose of the equal footing doctrine.

The equal footing rule was established in the Ordinance of 1787 setting up a procedure for the formation of new states. The Resolution of December 10, 1817, admitting Mississippi into the Union, reads:

> RESOLVED . . . that the state of Mississippi shall be one, and is hereby declared to be one, of the United States of America, and admitted into the union on an equal footing with the original states, in all respects whatever. 3 Stat. 472, 473.

Mississippi adopted the English common law.

The equal footing rule approved by Congress guaranteed that all new states would have the same rights and dominion over their tidelands as the original thirteen states, all of which were coastal. In 1817 when Mississippi received its tidelands, these were the only lands included within the public trust and which passed to the State under the equal footing rule. No suggestion was made at that time that if a new state had no coastline it must be given something to compensate it to meet a "constitutional rule of equality among the states."

That the original states owned all of their tidelands as a sovereign right, without limitation of any kind, and that these rights were not surrendered to the Federal Government under the Constitution have never been questioned. Thus Mississippi at statehood was

entitled to the same rights. Tidelands were considered "navigable waters"[2] under the common law and include all lands subject to the ebb and flow of the tide up to the high water mark.

The implication by Petitioners, that after nearly 200 years the well-settled meaning of "navigable waters" in 1787 should be retroactively changed to exclude non-navigable-in-fact tidelands has no merit in law. This new legal standard would require that all previous decisions of this Court with respect to state ownership of tidelands would have to be overruled, and that all titles in such lands now vested in the State would have to be voided and turned over to the adjacent upland owners in order to ensure that

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[2] Under the strict common law definition of "navigable" all waters subject to the ebb and flow of the tide are considered navigable, so there can be no such thing as "non-navigable" tidewaters.

Mississippi would not have a "more-than-equal" footing over inland states.

The following excerpts from decisions of this Court confirm that the new states received all of their tidelands at statehood:[3]

Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842),

> "For when the Revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.

Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 230 (1845):

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[3] This general equal footing rule of ownership of tidelands is qualified by an exception in the case of individual lawful titles to tidelands which are protected by a pre-statehood international treaty, as in the case of California under the 1848 U.S. Treaty with Mexico.

"First. The shores of navigable waters and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively.

Second. The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States.

Third. The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case."

Shively v. Bowlby, 152 U.S. 1, 57, 58 (1894):

"At common law, the title and the dominion in lands flowed by the tide were in the king for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states, within their respective borders, subject to the rights surrendered by the Constitution to the United States.

* * * * *

The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions.

* * * * *

The donation land claim, bounded by the Columbia river, upon which the plaintiff in error relies, includes no title or right in the land below high water mark;...." (Emphasis supplied)

Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10, 15, 16 (1935):

"The controversy is limited by settled principles governing the title to tidelands. The soils under tidewaters within the original States were reserved to them respectively, and the States since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original States possessed. Martin v. Waddell, 16 Pet. 367, 410, 10 L.ed. 565, 573, 574; Goodtitle ex dem. Pollard v. Kibbe, 9 How. 471, 478, 13 L.Ed. 220, 223; Weber v. State Harbor Comrs., 18 Wall. 57, 65, 66, 21 L.ed. 798, 801, 802; Shively v. Bowlby, 152 U.S. 1, 15, 26, 38

L.ed. 331, 337, 341, 14 S.Ct. 548.

This doctrine applies to tidelands in California...

* * * * *

"It follows that if the land in question was tideland, the title passed to California at the time of her admission to the Union in 1850. That the Federal Government had no power to convey tidelands which had thus vested in a State, was early determined. Pollard v. Hagan .... See also Shively v. Bowlby..." (Emphasis supplied)

Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 374 (1977):

"Thus under Pollard's Lessee the State's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself. The rule laid down in Pollard's Lessee has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is absolute so far as any federal principle of land titles is concerned. For example, in Weber v. Harbor Comm'rs, 18 Wall., at 65-66, the Court reaffirmed the doctrine of Pollard's Lessee:

'Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters....(Emphasis added)'"

Summa Corp. v. California ex rel. State Lands Commission, 466 U.S. 198, 205 (1984):

"The federal government, of course, cannot dispose of a right possessed by the State under the equal footing doctrine of the United States Constitution. Pollard's Lessee v. Hagan, 3 How. 212 (1845). Thus, an ordinary federal patent purporting to convey tidelands located within a state to a private individual is invalid, since the United States holds such tidelands only in trust for the state. Borax Co. v. Los Angeles, 296 U.S. 10, 15-16 (1935)."

The case of Utah v. United States, No. 85-1772, 55 U.S. Law Week 3257 (Oct. 14, 1986),

in which this Court recently granted certiorari, and mentioned by Petitioners as presenting "another facet of the public trust doctrine," has no bearing on the instant case.

The issue in Utah v. United States, Ibid., is whether the provisions of a pre-statehood federal law, reserving federal title to Utah Lake as a reservoir, can defeat the State's entitlement to the ownership of the lakebed at statehood. The Federal Government claims that it had the right to reserve ownership of Utah Lake for the purposes of irrigation under the "public exigency" exception in the equal footing doctrine. Shively v. Bowlby, 152 U.S. 1, 48-50 (1894); Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10, 15, 18 (1935).

There is a significant distinction between the Utah and Mississippi cases. In the Mississippi case, while the Federal Government

held the tidelands in trust for the future State, it made no reservations, and indeed could lawfully make none, concerning any of these lands and therefore the State received all of its tidelands upon its admission to the Union in 1817.

If, as suggested by Petitioners, the reason for denial of certiorari by this Court in City of Newark v. Natural Resource Council, 82 N.J. 530, 414 A.2d 1304 (1980), 449 U.S. 983 (1980), was that it involved sovereign ownership of tidelands under the common law by one of the original thirteen states and therefore did not present a federal question, it follows that this Court should deny certiorari in the instant case under the equal footing doctrine.

2. The navigability-in-fact test did not replace the ebb and flow test in tidal waters.

In the Propeller Genesee Chief v. Fitzhugh, 53 U.S (12 How.) 443 (1851), this Court

extended the federal admiralty jurisdiction to commercially navigable waters above the tide. Consistent with these principles, this Court in Barney v. Keokuk, 94 U.S. 324 (1876) extended the doctrine of state ownership of tidewaters to state ownership of waters which were nontidal but navigable in fact, such extension being affirmed by this Court in Oregon ex rel., State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 374, 375 (1977). The extension of state dominion over navigable-in-fact waters above the tide did not change the ebb and flow test as it applies to ownership of tidelands.

Petitioners assert that the "toothpick navigability" test created by the Court below conflicts with this Court's historic "navigability-in-fact test." This Court has never established a navigability-in-fact test as a requirement for state ownership of

tidelands and Petitioners present no proof of their contention. The "toothpick test" is not in conflict with the navigability-in-fact test of navigability of waters because it is merely a means of measuring the boundaries of the lands within the public trust. It can be used to determine the high water mark in both tidal and nontidal waters. It was never intended to determine the depth of a navigable-in-fact channel. Despite petitioners' belittling comments, the "toothpick test" is a simple, graphic illustration of how the boundaries of lands under the public trust can be determined without the use of any expensive and complicated survey techniques.

In all the decisions of this Court regarding ownership of tidelands, the test of ownership by a state of its tidelands at statehood is whether such lands are subject to

the ebb and flow of the tide. None of these cases has applied a navigability-in-fact test.

The central purpose of the Petitioners' argument becomes clear. It is an attempt to show that the decisions of this Court establish that the ebb and flow test has been discarded and replaced by the navigability-in-fact test with respect to all waters, tidal and nontidal.

First, Petitioners claim that "the repeated decisions of this Court" hold that "the wetlands to which the states acquire public trust dominion are those beneath navigable [meaning navigable in fact] waters, tidal or fresh." (Pet. Brief p. 11) This statement flies in the face of such landmark decisions regarding tidelands as Martin v. Waddell, Pollard's Lessee v. Hagan, Shively v. Bowlby, and Borax Consolidated, Ltd. v. City of Los Angeles, supra.

Next, petitioners cite McGilvra v. Ross, 215 U.S. 70 (1909), and Oklahoma v. Texas, 258 U.S. 574 (1922), as proof that the navigability-in-fact test is the settled rule in this country. It should be noted that those two cases cited do not relate to tidelands but are concerned only with navigable nontidal waters.

Finally, through an erroneous construction of Shively v. Bowlby, supra, and McGilvra v. Ross, supra, Petitioners reach an equally erroneous conclusion that, after Shively and McGilvra, the ebb and flow test has been rendered useless as it applies to tidal waters and has been replaced by the navigable-in-fact test.

Petitioners object to the Mississippi court's assertion of dominion over non-navigable tidelands which, they assert, "appears to be in direct conflict with Shively

v. Bowlby, 152 U.S. 1 (1894), where a similar contention was rejected." Petitioners charge that "the court below refused to apply the Shively 'navigability-in-fact' test," such ruling "lacking any definitive support in this Court's rulings." The statement is also made that the Shively ruling was summarized in McGilvra v. Ross. (Pet. Brief p. 13, 14)

The facts reveal the fallacy in these statements and conclusions.

The ruling of the Mississippi court is obviously not in conflict with this Court's ruling in Shively. Both were tidal cases decided in accordance with the ebb and flow test. In Shively this Court upheld the ruling of the Oregon Supreme court that upon the admission of Oregon into the Union, the tidelands became its property under the common law. Shively v. Bowlby, 152 U.S. 1, 54 (1894).

The Shively ruling was not "summarized" in McGilvra as contended by Petitioners. The McGilvra Court referred to Shively because that Court reviewed all the previous decisions regarding ownership of waters by the States, both above and below the tide. The first nontidal case reviewed was the Genesee Chief, supra, which became the controlling precedent in McGilvra.

It should be noted that the passage quoted from McGilvra, at page 78, has been taken out of context and the facts and arguments of counsel completely ignored, in order to rationalize the desired result. A key line has been omitted immediately before the quoted passage which is crucial to a correct interpretation. It reads at page 78: "We will not review the reasoning by which this contention is attempted to be supported." (Emphasis added)

McGilvra v. Ross, supra, concerned shore lands bordering on two navigable-in-fact freshwater lakes in the State of Washington. McGilvra claimed under a federal patent granted before the state entered the Union. Both parties cited Shively, for different reasons. The State of Washington claimed ownership of these lakes because the State's trust ownership of all its tidelands was extended to include navigable-in-fact waters above the tide due to the ruling in The Genesee Chief, supra. Counsel for McGilvra contended that the freshwater riparian rights of McGilvra should be decided under the common law rule that waters above the ebb and flow of the tide are privately owned, because he acquired such rights before Washington became a state. This is the "contention" rejected by the Court in the line omitted from the quoted passage.

The correct interpretation of the passage is that the Court concluded that, since the Genesee Chief, the common law test of ownership was no longer applicable to navigable-in-fact waters above the tide; that the term "navigable waters," as used in the Genesee Chief, meant "waters which were navigable in fact," and that this "became the test of the dominion of the national and state governments over shore lands and the rights which they had or could convey." The descriptive terms "riparian ownership" and "shore lands," correctly used by the Court, refer to nontidal lakes and rivers. The Petitioners ignored the actual meaning of these words.

The Court did not hold in McGilvra that the ebb and flow test has been replaced with reference to tidelands. The decision merely sustains the ownership by the

states of navigable-in-fact waters above the tide.

This Court's decision in Borax in 1909, and affirmed by Summa in 1984, leaves no doubt that the ebb and flow of the tide is still the test of state ownership of tidelands. Again in Borax this Court's decision was that if the land in question was tideland, it belonged to the State of California at statehood. The importance of Borax is evidently lost on petitioners who limit reference to this decision to a one-line footnote, and Summa is not even mentioned.

It is interesting to note that this petition includes no quotation from any decision of this Court regarding tidelands. Unquestionably, the reason is that every decision on the ownership of tidelands shows that the states received full ownership of their tidelands at statehood.

The later cases cited by petitioners have no bearing on the question presented to this Court. United States v. California, 332 U.S. 19, (1947), concerned ownership of the territorial sea but the United States did acknowledge ownership by the states of their tidelands under the Pollard rule. Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973), and Montana v. U.S., 450 U.S. 544 (1981), were both freshwater cases not relevant to the question presented to this Court.

Respondent submits that the failure of Petitioners to sustain their arguments shows that the question presented to this Court is not worthy of a further review.

3. Implementation of the decision below is solely a state question

The Mississippi Supreme Court stated that although public and private interests were in conflict in this case, "this in the end is a title suit." (Pet. App. 1a). Evidence

presented in the Chancery Court of Hancock County proved that the Cinque Bambini Partnership was claiming that its patents included 140 plus acres of tidelands. It is well settled that no federal patent can convey tidelands which have vested in a state. Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10, 16 (1935). The title to such tidelands is not subject to defeasance. Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378 (1977). After tidelands have vested in a state at statehood, state law governs the rights and titles of upland owners in the tidelands. Shively v. Bowlby, supra, at pages 25, 57-58 and Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., supra, page 375.

The many decisions cited by the Mississippi Supreme Court (Pet. App. 13a, 14a) have been consistent with the decisions of this

Court. Without exception they have affirmed that the State owns all of its tidelands "wherever the tide ebbs and flows." (Pet. App. 13a) Consequently, the private owners of adjacent uplands should have known that the original patents to the lands in question were ordinary "donation" patents granted by the United States Government for public lands and could not convey title to tidelands.

The charge that Mississippi asserted such title "on a retroactive basis going back more than 150 years, " is untrue. This is not a retroactive proceeding. The State is not asserting a new title to these lands, rather we are simply asserting our sovereign rights by claiming our own property to which we have an indefeasible title going back to 1817. The State's title cannot be lost by adverse possession or laches in asserting dominion over its tidelands. (Pet. App. 25a)

The Cinque Bambini Partnership is not being deprived of its property in this instance because it never received title to the tidelands in question.

It should not go unnoticed that the Cinque Bambini's private contractor at their direction, while constructing their private lakes, completely destroyed valuable state-owned wetlands and bayous, merging them with their artificially created tidelands, and thus drastically changing the ecology of the region.

Claimed impact on private interests by Petitioners because of the decision below is impossible due to the fact that lawfully no private interest exists. Ownership of the tidelands was, and is, vested in all of the citizens of the State and the benefits of such ownership rightfully belong to all the people

in the State and not to the few who have encroached on state owned lands.

The Mississippi court ruled properly in accordance with established law. The implication that the court should have ignored rules of law and the rights of all the people in their trust lands and considered only the possible "devastating impact" on a few private landholders is an insult to the Mississippi Supreme Court.

CONCLUSION

For all the foregoing reasons and there being no question of substantial constitutional merit raised, this petition for writ of certiorari should be denied.

Respectfully submitted,

EDWIN LLOYD PITTMAN
ATTORNEY GENERAL
STATE OF MISSISSIPPI

ROBERT FRANKLIN SPENCER
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

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TELEPHONE: (601) 359-3680

Counsel for Respondent
State of Mississippi

January 26, 1987

CERTIFICATE OF SERVICE

I, Robert Franklin Spencer, Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date caused to be mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF IN OPPOSITION** to the following:

Eugene Gressman
School of Law
University of North Carolina
Chapel Hill, N.C. 27514

Joel Blass
Mize, Thompson & Blass
Suite 310, Gulf National Bank Building
Gulfport, MS 39502-0160

William G. Paul, General Counsel
John L. Williford
Elizabeth A. Harris
Legal Division, Phillips
Petroleum Company
1252 Adams Building
Bartlesville, Oklahoma 74004

BEST

Ed Harper
5th Floor 518 Building
518 E. Capital Street
Jackson, Mississippi 39201

Boyce Holleman
Boyce Holleman, P.A.
Post Office Drawer 1030
Gulfport, Mississippi 39501

Robert Marsel
2400 Westheimer
Houston, Texas 77098

This the 26th day of January, 1987.

Robert Franklin Spencer
ROBERT FRANKLIN SPENCER

AVAILABLE COPY

16th Congress. No. 322. 2d Session.

LAND CLAIMS EAST OF PEARL RIVER AND IN THE TOWN OF MOBILE.

COMMUNICATED TO THE SENATE NOVEMBER 17, 1820.

GENERAL LAND OFFICE,
16th November, 1820.

SIR: I have the honor to transmit herewith copies of the reports of the Land Commissioners at Jackson court-house, and a copy of a letter, (dated 17th August, 1820,) which accompanied them: the reports are numbered 1 to 9, inclusive.

I have the honor to be, most respectfully, sir, your obedient servant,

JOSIAH MEIGS.

The Hon. the PRESIDENT *of the Senate.*

LAND OFFICE AT JACKSON COURT-HOUSE,
August 17th, 1820.

SIR: In conformity with a requisition of the 9th section of the act of Congress, entitled "An act for adjusting the claims to land and establishing land offices in the districts east of the island of New Orleans," I have the honor to report lists or registers of all the claims to land which have been filed in this office, with the substance of the evidence in support thereof, and such remarks upon the claims as appeared to me to be proper.

In consequence of the suggestion in your letter of the 13th November last, evidence of claims to lots in the town of Mobile has been received, which you will find in register No. 7.

Register No. 9, and the accompanying papers, contain a full report of the evidence and the opinion of the register and receiver in relation to the conflicting claims of Joseph McCandless and Ilcria Bermudy.

I have the honor, &c.

W. BARTON, *Register.*

Hon. J. MEIGS,
Commissioner Gen. Land Office, Washington City.

No. 1.

A list of actual settlers in the district east of Pearl river, in Louisiana, prior to the 3d March, 1813, who have no claims derived from either the French, British, or Spanish Governments.

No.	Present claimants.	Original claimants.	Date of pres't settlement.	Date of original settlement.	Where situated.
1	Valentine Delmas	Valentine Delmas	June, 1813	June, 1813	Pascagoula bay
2	Rene Krebs	Rene Krebs	" 1813	June, 1801	Pascagoula bay
3	Rene Krebs	Pierre Krebs	June, 1813	About 1799	Pascagoula bay
4	Antoine Krebs	Antoine Krebs	" 1813	" 1810	Pascagoula bay
5	Hilaire Krebs	Hilaire Krebs	June, 1813	June, 1794	Pascagoula bay
6	Isabella Ghosin	Isabella Ghosin	June, 1813	June, 1794	Pascagoula bay
7	Helen Moro	Helen Moro	June, 1813	June, 1794	Pascagoula bay
8	Jacob Holland	Jacob Holland	July, 1813	Calm. only, 1812	Pascagoula river
9	Thomas Bilbo	Thomas Bilbo	July, 1813	Calm. only, 1812	East side Pascagoula river
10	John Deane	John Deane	July, 1813	" 1809	West side Pascagoula river
11	Charles Holland, jun.	Charles Holland, jun.	July, 1813	" 1812	West side Pascagoula river
12	Maher Lyle	Maher Lyle	July, 1813	January, 1812	Fork of Chickenaw bay & Leaf riv.
13	Daniel McCaskill	Bryant Ferrell	" "	August, 1812	Skinner's creek
14	George B. Demeree	Mde. Nesst Pacquet	Aug. 1813	" 1779	Above White's point, Pasca. riv.*
15	William Patterson	William Patterson	July, 1813	" 1812	East side of Mobile bay
16	John Brewer, jun.	John Brewer, jun.	July, 1813	March, 1808	Pascagoula river
17	Edmond Smith	Edmond Smith	July, 1813	" 1812	East side of Pascagoula river
18	Moss Strahon	Presley German	Aug. 1813	" 1810	East of Pearl river
19	Repa. Joseph Cooper	Joseph Cooper	Sept. 1813	" 1812	Pearl river
20	John Culpepper, sen.	John Culpepper, jun.	Oct. 1813	Spring, 1812	South side of Taylor's creek
21	Stephen Terrell	Stephen Terrell	Oct. 20 1813	1st June, 1811	Old river, near Pearl
22	S. & J. Ford & W. Hunt	John Culpepper, sen.	Nov. 1813	" 1810	Pearl river
23	John Joseph Jourdan	John Jh. Jourdan	Nov. 1813	" 1807	Catahoula river
24	Eleazar W. Ripley	Pierre Morin	" "	" "	Jourdan river†
25	Pierre Cotta	Pierre Cotta	Nov. 1813	" 1801	Grand Bois fort
26	Elisha Carver	Elisha Carver	Nov. 1813	March, 1813	South side Bay of St. Louis
27	Melite Le Sassier	Melite La Sassier	Nov. 1813	" 1813	Bay of St. Louis
28	Noel Jourdan	Noel Jourdan	Nov. 1813	Prior to Ap. 1814	Jourdan river
29	John Bte. Favre	John Bte. Favre	Nov. 1813	April, 1812	Hickory Camp creek
30	Charles Nicasse	Charles Nicasse	Nov. 1813	Pr to 15 Ap. 1812	South side Bouchee creek
31	Joseph Favre	Joseph Favre	June, 1813	2 yrs. pr Ap. 1812	Catahoula river
32	John Guerre	John Guerre	Nov. 1813	" 1812	Bona Chova creek
33	Antoine Chabert	Antoine Chabert	Nov. 1813	" 1810	West bank Jourdan river

* For about six years.

† Inhabited and cultivated for 12 years prior to the taking possession of the country by the United States, and from 1814 to November, 1819.

BEST AVAI

LIST—Continued.

No.	Present claimant.	Original claimant.	Date of present settlement.	Date of original settlement.	Where situated.
1	James McArthur	James McArthur	Nov. 1819	- 1811	Bohemian creek
2	Admr. of Thomas Drury	Thomas Drury	Mar. 1820	- 1812	South side Mobile bay
3	Augustus La Coste	Elizabeth Harthy	Mar. 1820	- 1812	Bay John
4	Joseph Gerdat	Joseph Gerdat	Jan. 1820	- 1810	Park Bottom
5	Heirs of Henry Fremont	Henry Fremont	for many y'rs	previous to 1808	Isle Aux Loups
6	John Bte. Lamy	John B. Lamy	Feb. 1820	- 1792	West side Dauphin island
7	John Cook	Francis Andrew	Feb. 1820	- 1804 or '5	Grand Bay John
8	Samuel Soares	Samuel Soares	April, 1820	Prior to Ap. 1812	Bay of Perdido
9	William Kee	William Kee	April, 1820	- 1812	South side of "Bay" La Launa
10	Peter Soares	Peter Soares	April, 1820	- 1812	West side of Perdido bay
11	Rep.s of Duret	Louis Duret	April, 1820	March, 1790	Eut below Mobile
12	Louis Alexis	Edwin Lewis	Dec. 1820	- 1811	Pascagoula river
13	Martha F. Dolives	Martha F. Dolives	Mar. 1820	- 1812	Three Mile creek
14	Burwell Rouse	Burwell Rouse	Mar. 1820	- 1809	East side of Pascagoula river
15	John Bte. Ravage	John B. Ravage	- -	- b. 1791	Six miles north of Bayou Bistro*
16	George Davis	George Davis	- 1820	Col. and. June, 1811	Fork of Cedar creek
17	Hilaire Dubreuil	Hilaire Dubreuil	- 1812	- 1811	St. Philip's Head
18	Henry Conway	Henry Conway	Feb. 1820	- 1811	Near Elakelee
19	Maximilian Dubreuil	Maximilian Dubreuil	- 1820	- 1808	Twenty-one miles above Mobile
20	Isaac Graves	Celeste Favre	June, 1820	- 1812	Pearl river
21	Francis Cunningham	Francis Cunningham	Nov. 1819	March, 1813	East side Pascagoula river
22	Elisha Lott	Elisha Lott	- 1820	- 1812	Bainchete creek
23	Joseph Soares	Joseph Soares	April, 1820	- 1812	W. Perdido river
24	Ste. Nicanor, natl. guardian of Joseph's heirs	Joseph Lefont	June, 1820	- 1811	Bay of St. Louis
25	Chevalier Dubreuil	Chevalier Dubreuil	June, 1820	- 1810	South side Wolf river
26	Joachim Pierre Dana	Joachim P. Dana	June, 1820	- 1812	East part Bay of St. Louis
27	John Bte. Nicanor	John Bte. Nicanor	June, 1820	- 1812	Jourdon river
28	Charles Ladner	Charles Ladner	June, 1820	- 1811	East of Wolf river
29	John Ladner	John Ladner	June, 1820	- 1812	Bay of St. Louis
30	John Philip Tessier	John F. Soucier	June, 1820	May, 1812	West side Wolf river
31	Felix Turon	Felix Turon	June, 1820	- 1812	Bay of St. Louis
32	Francis Collet	Thomas Johnson	- 1820	- 1812	East side Iron Jaune river
33	Samuel Ketchen	Samuel Ketchen	June, 1820	- 1811	East of Texas river
34	John B. Vaughan	John B. Vaughan	- 1814	- 1812	Pascagoula river
35	Michael McKinney	Michael McKinney	- -	Early part of 1812	Fish river
36	Reps. of Henry Rankin	Henry Rankin	- 1820	- 1802	Fish river
37	Reps. of James Garnett	James Garnett	June, 1820	June, 1811	Pascagoula river
38	Simeon Dunn	Simeon Dunn	Oct. 1819	March, 1812	Pascagoula river
39	Allen Gordon	Allen Gordon	June, 1820	- 1811	East Pascagoula river
40	Reps. of August's Krebs	Augustus Krebs	June, 1820	- 1811	East side of Pascagoula river
41	Francois Krebs	Joseph Krebs	- -	- 1805	East side of Pascagoula river
42	Reps. of John Graham	John Graham	- 1819	- 1809	East side of Pascagoula river
43	Moses Strahan	Bartlett Brown	Nov. 1819	Autumn, 1812	Buck's branch E. Pearl river
44	William Baxter	William Baxter	Dec. 1819	January, 1813	Juniper branch
45	David Kennedy	David Kennedy	Dec. 2, 1819	October, 1810	West or south side Whiskey cr'k
46	Hiram Smith	Hiram Smith	Oct. 1819	- 1817	East side of Pearl river
47	De Lazzaro	Joseph de Lazzaro	Nov. 22, 1819	August 15, 1817	Bayou La Galliera
48	William J. Stuart	William J. Stuart	Nov. 23, 1819	March, 1815	Bayou Chevreuil
49	Pierre Meria	Pierre Meria	Nov. 22, 1819	Autumn, 1813	Jourdan river
50	William Morrison	William Morrison	Nov. 25, 1819	March, 1817	Bohemian creek
51	John S. Brush	John S. Brush	Nov. 25, 1819	- 1817	W. side up. South Bohemia cr'k
52	Richard Mayo	Richard Mayo	Nov. 1819	January, 1819	East of Pearl river
53	James Tillman	James Tillman	July, 1819	Prior Mar. 3, 1819	Red Creek swamp
54	Mathew Richardson	Mathew Richardson	Aug. 7, 1819	January, 1814	Cedar swamp
55	Charles Lyon	Charles Lyon	Sept. 1819	Autumn, 1818	Head of Cedar creek
56	Noel Turner	Noel Turner	July, 1819	February, 1819	West branch of Cedar creek
57	John Monroe	Charles Hall	July, 1819	April, 1814	Indian creek
58	John Jacob Berg	John Jacob Berg	July, 1819	- 1818	Bayou ———
59	Charles Turner	Charles Turner	Sept. 1819	February, 1819	West prong Cedar creek
60	Joseph H. Gibson	Joseph H. Gibson	Sept. 1819	January, 1819	West pole Escatawpa river
61	Francis Williams	Francis Williams	Sept. 1819	- 1817	West side Big creek
62	David Odom	David Odom	Sept. 1819	February, 1819	West of Bug river
63	Moses Monk	Moses Monk	Mar. 1819	February, 1817	Red Creek island
64	John Farley	John Farley	Oct. 1819	January, 1819	West side Black creek
65	Henry Fletcher	Henry Fletcher	July, 1819	- 1818	Fork of Indian creek
66	Charles Brunet	Charles Brunet	July, 1819	February, 1819	Red creek
67	John Bourre	John Brunet	July, 1819	February, 1819	Fork of Brushy and Red creek
68	Richard Gattens	Richard Gattens	July, 1819	February, 1819	Fork of Brushy and Red creek
69	Grifin Brunet	Grifin Brunet	July, 1819	January, 1812	Black creek
70	Thomas Carter	Thomas Carter	July, 1819	August, 1818	Pascagoula river
71	William Sneider	William Sneider	July, 1819	January, 1814	Black creek
72	Joseph Rodgers, jun.	Joseph Rodgers, jun.	July, 1819	February, 1817	Black Creek to map
73	Prevoir Mathews	Prevoir Mathews	July, 1819	February, 1819	Red creek
74	James Langham	James Langham	Aug. 1819	July, 1817	Cold creek
75	Joseph Burns	Joseph Burns	Sept. 1819	- 1810	West side Pascagoula river
76	Mary Baxter	Mary Baxter	Oct. 1819	January, 1813	Main road fm Mobile to Lee river
77	Benjamin Williams	Benjamin Williams	Oct. 1819	January, 1819	Two miles from Williams' ferry
78	Lewis Williams	Charles Mahony	Oct. 1819	October, 1814	Bug River ferry
79	Enoch Turner	Enoch Turner	July, 1819	February, 1819	Gresham's creek
80	Joshua Murray	Joshua Murray	July, 1819	October, 1817	East branch of Cedar creek
81	Wyche Whatley	Wyche Whatley	Oct. 1819	December, 1813	Bogue Homo

* How long continued is not proven. † Till after the Americans took possession of the country.

‡ To 1814, and subsequently to June, 1820.

ABLE COPY

LIST—Continued.

No.	Present claimant.	Original claimant.	Date of present settlement.	Date of original settlement.	Where situated.
115	James Gold and Henry Patterson	James Gold & H. Patterson	Aug. 1819	August, 1816	East side Mobile bay
116	Smith Johnson	Smith Johnson	July, 1819	January, 1817	Black creek
117	Lewis Goff	Lewis Goff	Sept. 1819	Autumn, 1817	West side of Cedar creek
118	Edmund Goff	Edmund Goff	Sept. 1819	Spring, 1818	Upper fork of Cedar creek
119	Thomas Mellowell	Thomas McDowell	Aug. 1819	" 1816	Pascagoula river
120	Samuel Snell	Aaron Burleson	Jan. 1820	September, 1818	South side of Smith's creek
121	Samuel H. Garrow	Samuel H. Garrow	Jan. 1820	Autumn, 1813	West side of Mobile bay
122	James Goff	James Goff	Dec. 1819	" 1815	Between Cedar and Black creeks
123	Aaron Burleson	Aaron Burleson	Jan. 1820	November, 1818	On the road to Clement's mill
124	Charles Conway	Charles Conway	Jan. 1820	January, 1819	On a creek emptying into Bay Mobile
125	Hezekiah Reuter	Hezekiah Reuter	May, 1820	December, 1816	East side of Red creek
126	James Denmark	James Denmark	May, 1820	January, 1819	East side of Red creek
127	John W. Tanner	John W. Tanner	May, 1820	January, 1814	East side of Pascagoula river
128	Stephen Denmark	Stephen Denmark	May, 1820	January, 1819	East side of Red creek
129	Rodney Cooper	Rodney Cooper	May, 1820	February, 1818	East side of Pascagoula river
130	Regis Bernaiz	Regis Bernaiz	Jan. 1820	Autumn, 1816	Twenty-one miles n. w. of Mobile
131	General Clanel	General Clanel	Jan. 1820	November, 1817	West side Mobile bay
132	William Richardson	Thomas Lanthrop	June, 1820	Autumn, 1814	Five miles from Mobile
133	Jacob Harrell	Jacob Harrell	June, 1820	" 1818	Head of Crooked Billet creek
134	Jacob Page	Jacob Page	June, 1820	Autumn, 1813	Four and a half miles from Mobile
135	John Mason	John Mason	June, 1820	Spring, 1814	Chickasawhay road
136	John Havard	John Harvel	June, 1820	" 1817	South side of Big creek
137	George Fraser	George Fraser	June, 1820	" 1816	Bolachito creek
138	Rasberry Byrd	Rasberry Byrd	June, 1820	October, 1816	Head of Sweet Water creek
139	Donald McCleod	James Worden	June, 1820	February, 1818	Grove pond
140	John Spiers	John Spiers	June, 1820	Spring, 1818	Mill creek
141	Alexander Thiebout	Alexander Thiebout	June, 1820	Latter part 1814	H. Bolachito creek
142	Bartholomew Chisleven	Bartholomew Chisleven	June, 1820	" 1817	East side Pascagoula river
143	Reps. of James White	James White	June, 1820	" 1820	White's point, Pascagoula river
144	Clements & Kellogg	Clements & Kellogg	Feb. 1820	March, 1814	Tiny River mills
145	Dougald McCall	Dougald McCall	Nov. 1819	" 1815	Pearl river
146	Phebe Pollard	Phebe Pollard	Feb. 1820	December, 1817	One mile from Mobile
147	Joseph P. Kennedy	Daniel Hartley	April, 1820	Early part 1815	Bogue Homa
148	Henry V. Chamberlain	Carman Fraser	Feb. 1820	December, 1817	Near Mobile
149	John Jenadreau, Henry Stickney, John W. C. Fleeman	John Jenadreau, Henry Stickney, & J. W. C. Fleeman	April, 1820	February, 1819	West Mobile bay
150	Edwin Lewis	William Murphy	Jan. 1820	November, 1818	Six miles west of Mobile
151	Henry Williams	Henry Williams	Dec. 1819	December, 1815	Red springs
152	Jacob Heng	Jacob Heng	Dec. 1808	" 1804	Graveline, Bayou of
153	Joseph P. Kennedy	Cornelius Ross	Autumn 1819	Autumn, 1814	South side Bogue Homa

Remarks by the Register.—None but persons who have both inhabited and cultivated have been considered by the register and receiver as actual settlers: although many others, who have only either inhabited or cultivated, claimed to be registered as such. It is believed that some of the settlers are upon lands claimed by other persons under written evidence of title, but it is impossible to particularize them, as no new maps or plats accompany the claims.

W. BARTON, *Register.*

JACKSON COURT-HOUSE, *July the 11th*, 1820.

Attest: JNO. ELLIOTT, *Clerk.*

W. BARTON, *Register.*
WM. BARNETT, *Receiver.*

No. 2.

Register of claims to land in the district east of Pearl river, in Louisiana, founded on orders of survey, (requetes,) permissions to settle, or other written evidence of claim derived from either the French, British, or Spanish authorities, which, in the opinion of the undersigned, ought to be confirmed.

Number.	By whom claimed.	Original claimant.	Nature of claim, and from what authority derived.	Date of claim.	Quantity claimed. Front.	Quantity claimed. Deep.	Quantity claimed. Area in arpens.	Where situated.	By whom issued.	When surveyed.	By whom surveyed.	Cultivation and inhabitation. From	Cultivation and inhabitation. To
1	Joshua Kennedy	Francis Fisher	Spa. Governm't	3d July, 1790	20	42	800	East side Texas river	M'l Gayoso de Lemos	No survey	- - -	1793	1814
2	Joshua Kennedy	Chs. Elliot & Leparee	Spa. Governm't	1st April, 1790	21	40	840	Bayou Pupuhee	Lanaux - During	French & British	Governments, and f	rom 1809	1820
3	Thomas Byrne	Cornelius Dunn	Spa. Governm't	17th Sept., 1796	Unknown		-	Patasau bayou	Peter Oliver	No survey	- - -	1795	1804
4	Eam'l Acre, for self and heirs of Narcissus Brenton	Narcissus Brenton	Spa. Governm't	18th June, 1793	20	40	800	Bayou Facoucha	M. Gayoso de Lemos	No survey	- - -	1797	1801
5	John Johnston, sr.	John Johnston, sr.	Spa. Governm't	10th June, 1795	20	40	800	East Tombechee riv.	Baron de Carondelet	No survey	- - -	1793	Jan. 1820
6	Augustin Lacoste	Joseph Mure	Spa. Governm't	21st Sept., 1791	Unknown		-	Dauphin island	Grabot - -	No survey	- - -	1761	for 20 years.
7	Joshua Kennedy	Empresa Bunage, as heirs of L. McCurtin - - -	Spa. Governm't Confirmed	16th Aug., 1787 21st Aug., 1810	-	-	3,200	Texas river -	Stephen Mire	3d August, 1810	V. S. Pintado	1810	1820 by present claim't.

Jackson Court-house, *July* 11, 1820. Attest: Jno. Elliott, *Clerk*.

W. BARTON, *Register*.
WM. BARNETT, *Receiver*.

Remarks by the Register.—Some of the preceding claims have emanated from commandants whose authority to grant permission to settle did not extend beyond eight hundred arpens, to which quantity it is conceived such should be limited. The instructions of Gayoso and Morales seem to recognize a right in the settler after three years inhabitation and cultivation, commenced within one year from the date of the permission or order of settlement, and continued for three consecutive years. In all such cases it is supposed the claim ought to be confirmed, although the land has not been regularly inhabited and cultivated afterwards, if it has not been subsequently granted by the Spanish Government.

W. BARTON, *Register*.

No. 3.

Register of claims to land in the district east of Pearl river, in Louisiana, founded on orders of survey, (requetes,) permissions to settle, or other written evidence of claim, derived from either the French, British, or Spanish authorities, which, in the opinion of the undersigned, ought not to be confirmed.

Number.	By whom claimed.	Original claimant.	Nature of claim, and from what authority derived.	Date of claim.	Quantity claimed. Front	Quantity claimed. Deep.	Quantity claimed. Area in arpens.	Where situated.	By whom issued	Surveyed.	Inhabitation and cultivation.
1	Charles Lelonde	Charles Lelonde	Spa. ord. survey	29 May, 1800	4	40	160	Near Mobile	Cayetano Perez	No survey	Not inhabited nor cultivated.
2	Ebenezer Ross	Ebenezer Ross	Spa. concession	24 January, 1793	-	-	1,000	Bayou Sarah	Gayoso	No survey	Not inhabited nor cultivated.
3	Bepres. F. Fontanillas	F. Fontanillas	Spa. ord. survey	10 June, 1793	20	40	800	Tombechee river	Baron Carondelet	No survey	Not inhabited nor cultivated.
4	Nicholas Wacho	N. Wacho	Spa. permit	29 May, 1811	3	40	260	River "du Bar"	Morales	No survey	No evidence of inhabitation or cultivation, nor that the conditions of the grant were complied with.
5	John Eubanks, sen.	John Eubanks, sen.	Spa. permit	4 February, 1802	-	-	800	River Estaspuché	J. de Gourue	No survey	Cultivation in 1806, by original claimant.

No. 3—Continued.

Number.	By whom claimed.	Original claimant.	Nature of claim, and from what authority derived.	Date of claim.	Quantity claimed. Front.	Depth.	Area in arpents	Where situated.	By whom issued.	When surveyed	Inhabitation and cultivation.
6	Thomas Shields	Constancio Tardiff	Spa. ord. survey	24 April, 1790	20	40	800	Bay of St. Louis	Stephen Miro	No survey	From 1789 to 1815.
7	Anna Burnett	John Bap. Marin	Spa. permit	18 October, 1797	12	60	480	Chatcumpomhon	Philip Zaucier	No survey	Granted by Philip Zaucier, syndic, who had no authority to grant lands.
8	John Jos. Jourdan	John J. Jourdan	Spa. permit	24 April, 1798	25	40	1,000	Bay of St. Louis	Gayoso de Lemos	No survey	Not inhabited nor cultivated.
9	Anthony L. Carroll	Anthony L. Carroll	Spa. permit	24 July, 1802	-	-	2,000	Pearl river	Grandpré	No survey	Not inhabited nor cultivated.
10	Samuel A. Tanner	Samuel A. Tanner	Spa. permit	21 March, 1799	-	-	1,600	Pearl river	Gayoso	No survey	Inhabitation and cultivation in 1802.
11	Francisco Bustea	Francisco Bustea	Spa. ord. survey	22 Sept. 1799	40	40	1,600	W. Pardido river	B. Garcia Cableron	No survey	Inhabitation and cultivation from Jan'y 1811, to January 1820.
12	Lewis Judson and Peter H. Hobart	John McDonald	Spa. ord. settlement	10 July, 1798	-	-	1,600	Baton Sarah	Mr. Gayoso	No survey	Not inhabited nor cultivated.
13	Washington Wilkins	Wash. Wilkins	Spa. permit	31 January, 1809	-	-	800	E. Tensa river	Salazar	No survey	Not inhabited nor cultivated.
14	Wyndham Wren	Lutheyage Robertson	Spa. permit	9 June, 1792	Unknown.		-	Bay of Belazy	Grimarest	No survey	No evidence.
15	Heirs of G. Byrne	Gerald Byrne	Spa. permit	13 January, 1801	21 front, 3 in depth.			River Vashlach	J. de Gorne	No survey	Cultivated, but not inhabited.
16	John Densmore	Francis Krebs	Spa. permit	13 December, 1783	Unknown.		-	Round Island	Grimarest	No survey	Not inhabited nor cultivated.

Jackson Court-house, *July* 11, 1820. Attest, Jno. Ellicott, *Clerk.*

WM. BARTON, *Register.*
WM. BARNETT, *Receiver.*

Remarks by the Register.—Most of the preceding claims have been forfeited under the Spanish law, for want of inhabitation and cultivation; nor do they appear to be entitled to confirmation under any law of the United States. A few are granted by persons whose authority to grant is doubted, or at most upon so extensive a scale. In some cases the inhabitation and cultivation have not been commenced within the time required by the Spanish regulations; and, in others, have not been continued the requisite period by the original claimant or grantee, who had no power to alienate before he had complied with the conditions specified in the grant.

WM. BARTON, *Register.*

No. 4.

Register of claims to land in the district east of Pearl river, in Louisiana, founded on private conveyances, (which have passed through the office of the commandant,) or other evidence, and founded, as the claimant supposes, on grants lost by time or accident.

No.	By whom claimed.	Original claimant.	Quantity claimed.	Where situated.	Inhabitation and cultivation.	Remarks by the register.
1	Rep'n of Chev. and Louis de Lusser	Chev. & Louis de Lusser	Unknown - -	Junction of Mobile and Tensa rivers	From 1781 to 1789.	Though the original grants upon which the preceding claimants founded have been lost, yet it is conceived that the claims to such lands as have been inhabited and cultivated under the Spanish Government, or which were inhabited and cultivated under the British Government, by the person having the legal title therein at the date of the treaty of 3d September, 1783, between Great Britain and Spain, or which were sold and conveyed according to the provisions of the treaty, should be confirmed for a quantity equal to that allowed to actual settlers. W. BARTON, *Regr.*
2	Rep'n of Louis Durat	John Bte. de Lusser	Unknown - -	Opposite Tensa and Mobile rivers	From 1791, how long continued unknown.	
3	Rep'n of Louis Durat	Louis Durat	Unknown - -	Junction of Mobile and Tensa rivers	Under the British and Spanish Governments, and until the year 1791.	
4	Rep'n of John Bohom	John Bohom	Unknown - -	East side of Tensa river - -	Cultivated whilst the British had possession of the country.	
5	Charles Lelonde	Charles Gum	Unknown - -	Junction Deer river with Mobile bay	Under the British and Spanish Governments.	
6	Cthalus Pleck	Andre Pleck	Unknown - -	South side Fish river - -	During the British Government.	
7	Mary Stewart	Charles Stewart	2 arps. front 40 dp. area 80	East side Mobile bay - -	Under the British Government, until 1781.	
8	Mary Anne Dupont	Claude Dupont	Unknown - -	East side Tensa river - -	Under the British Government, and for two years afterwards.	
9	Michael Le Fleur	Dr. Grant	Unknown - -	East side Mobile bay - -	No evidence of inhabitation or cultivation.	

Jackson Court-house, *July the 11th*, 1820. Attest: Jno. Ellicott, *Clerk.*

W. BARTON, *Register.*
WM. BARNETT, *Receiver.*

AVAILABLE COPY

EDITOR'S NOTE

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source of the main stream. Every objection to granting the seventh prayer applies with equal force to this. They need not be repeated. The court did not err in rejecting it. The instructions to the jury, for which the plaintiff applied to the State court, are, some of them, mixed questions, involving fact with law, and requiring the court to decide the fact, and then to declare the law upon that fact. Others propose a rule, as of universal application, to ascertain the main branch of a river, and the source of that main branch, which would unquestionably, in many cases, mislead us. They propose one single circumstance, in exclusion of all others, as being the infallible evidence of a complex fact, depending on a number of varying circumstances.

The court very properly refused to give any of these instructions.

This court is of opinion that there is no error in the judgment of the State court, and that it ought to be affirmed, with costs.

29th Congress. No. 683. 2d Session.

LAND CLAIMS IN MISSISSIPPI.

COMMUNICATED TO THE SENATE FEBRUARY 18, 1839.

General Land Office,
17th February, 1839.

Sir: I have the honor to enclose, herewith, copies of reports of the register and receiver of the land office for the district of Jackson court-house, Mississippi, under the provisions of the act of Congress approved on the 26th of May, 1838, entitled "An act supplementary to the several acts providing for the adjustment of land claims in the State of Mississippi."

With great respect,
Your obedient servant,
GEO. GRAHAM.

The Hon. John C. Calhoun,
Vice President of the United States and President of the Senate.

Land Office at Augusta,
District of Jackson county, Miss., 15th Jan., 1839.

Sir: In obedience to the act entitled "An act supplementary to the several acts providing for the adjustment of land claims in the State of Mississippi," approved the 26th May, 1838:

In pursuance of the provisions of the above recited act, and for the purpose of carrying the same into effect, we did attend, after having given suitable notice to the claimants of the time and place of our meeting, and the object thereof; and, after having appointed Valentine Delmas, esq., clerk at Jackson court-house and the town of Shieldsborough, and held our respective sessions thereat so long as was thought necessary for carrying into effect the provisions of the aforesaid recited acts:

We have the honor, herewith, to report on the several claims received by us in the performance of the aforesaid duties. Reports numbers 1, 2, 3, and 4, contain the claims founded on written evidence: numbers 5 and 6, those founded on actual settlement. All of which are respectfully submitted.

With great respect,
Sir, your most obedient servants,
WM. HOWZE,
G. B. DAMERON.

George Graham, Esq.,
Commissioner General Land Office, Washington city.

REPORT No. 1.

Register of claims to lands within that part of the limits of the land district of Jackson court-house, in the State of Mississippi, lying below the 31st degree north latitude, (formerly Louisiana,) founded on complete grants derived from either the French, British, or Spanish Government, which, in the opinion of the undersigned, are not valid agreeably to the laws, usages, or customs, of such Government.

Number.	By whom claimed.	Original claimant.	Nature of claim, and from what authority derived.	Date of claim. Day.	Month.	Year.	Quantity claimed. Front.	Depth.	Area in arpens.	Area in acres.	Where situated.	By whom issued.	Surveyed. When.	Surveyed. By whom.	Inhabitation and cultivation. From	To
1	Daniel Boardman	John Marr	British Gov't	23	September	1778	"	"	"	300	Pascagoula	Peter Chester	18 Sept. 1778	Elias Durnford	Not inhabited or cultivation.	
2	Same	Same	Same	"	"	"	"	"	"	300	"	"	"	"	Do	do.

WILLIAM HOWZE, *Register.*
G. B. DAMERON, *Receiver.*

Remarks.—The above grants are void, because it does not appear that they were recognized by the Spanish Government, or that the land was ever inhabited or cultivated. It is believed that the same lands have been donated by our Government.

WM. HOWZE, *Register.*
G. B. DAMERON, *Receiver.*

ATTEST: VALENTINE DELMAS, *Clerk.*

REPORT No. 2.

Register of claims to lands within that part of the limits of the land district of Jackson court-house, in the State of Mississippi, lying below the 31st degree north latitude, (formerly Louisiana,) founded on orders of survey, requetes, permission to settle, or other written evidence of claim derived either from the French, British, or Spanish, authorities, which, in the opinion of the undersigned, ought to be confirmed.

Number.	By whom claimed.	Original claimant.	Nature of claim, and from what authority derived.	Date of claim. Day.	Month.	Year.	Quantity claimed. Front.	Depth.	Area in arpens.	Area in acres.	Where situated.	By whom issued.	When, and by whom surveyed	Inhabitation and cultivation. From	To
1	Juan de Cuevas	Nicholas Christian	Spanish permit	1	August	1781	Un	kno	wn	2661	Cat island	Manuel de Lonzas	No survey	1768	1828
2	Valentine Delmas	Anthony Blanc	Spanish permit	10	September	1793	6	40	240		Pascagoula bay	Bar. de Carondelet	No survey	1802	1828

WILLIAM HOWZE, *Register.*
G. B. DAMERON, *Receiver.*

Remarks.—Claim numbered one, designated as Cat island, contain 2,078 1-100ths acres, most of which are unfit for cultivation. The permit, on which this claim is founded, calls for the whole island. From the long and continued inhabitation and cultivation, it would seem that the claimant ought to be entitled to the whole island, if the laws, usages, and customs of the Spanish Government would warrant such an opinion.

WM. HOWZE, *Register.*
G. B. DAMERON, *Receiver.*

ATTEST: VALENTINE DELMAS, *Clerk.*

REPORT No. 3,

Register of claims to lands within that part of the limits of the land district of Jackson court-house, in the State of Mississippi, lying below the 31° of north latitude, (formerly Louisiana,) founded on orders of survey, requetes, permission to settle, or other written evidence of claim derived either from the French, British, or Spanish authorities, which, in the opinion of the former commissioners, ought not to be confirmed, but which have been revived, and additional testimony adduced in their support, and which, in the opinion of the undersigned, ought to be confirmed for a reasonable quantity.

Claim's Number.	Former Commissioners' report.				By whom claimed.	Original claimant.	Nature of claim, and from what authority derived.	Date of claim.	Quantity claimed.				By whom issued.	When, and by whom surveyed.	Additional testimony.
	Wm. Crawford.		Reg. & Receiver						Front.	Depth.	Arpents.	Acres.			
	No. report.	No. claim.	No. report.	No. claim.											
1	-	-	3	3	Eben. Reese -	Eben. Reese -	Span. concession	January 26, 1795	-	-	1,000	-	Gayoso -	No survey -	Inh., and cult. ever since 1802.
2	-	-	3	9	Anth'y L. Carrell -	Anth'y L. Carrell	Spanish permit	July 24, 1802	-	-	3,000	-	Grandpre -	No survey -	Inh. and cul. 1798, 1812, & 1813.
3	-	-	3	4	John J. Jourdan -	John J. Jourdan -	Spanish permit.	April 24, 1798	23	40	1,000	-	Gayoso de Lemos	No survey -	Inh. and cult. since 1802.
4	-	-	Special 4	2	Rep. of Louis Boisdoré	Louis Boisdoré -	Span. ord. survey	April 26, 1785	-	Unknown		-	Stephen Hore -	No survey -	Inh. and cult. from 1788 to 1828.

WM. HOWZE, *Register.*
G. B DAMERON, *Receiver.*

REMARKS.

Claims numbers 1, 2 and 3 were reported unfavorably of by the former commissioners for want of inhabitation and cultivation, and although the additional testimony which has been adduced in their support does not amount to full and satisfactory proof of inhabitation and cultivation, according to the laws, usages, and customs of the Spanish Government, they are, therefore, forfeited; yet, as the inhabitation and cultivation were prior to 1803, we are of opin on they ought to be confirmed for a reasonable quantity.

Claim number 4—This claim is founded on an order of survey issued by Governor Hore in favor of Louis Boisdoré, and confirmed to his widow Marguerette Bouisson by the Intendant Morales, 4th April, 1808. It does not appear by the title papers that an actual survey was made with geometrical precision, yet a map or conjectural plan, definetly fixing the limits of the claim, was made by the Surveyor-general Pintado, 30th May, 1810. The claim extends from Pearl river to the Bay of St. Louis, and is supposed to contain about *one hundred thousand* acres. The additional testimony adduced to us proves incontestibly that this claim has been inhabited, and a part of the land kept under cultivation upwards of forty years: it is also in testimony before us, that the extent of the claim was distinctly known to the neighbors, and that the claimant set up his claim to the whole limits contained within the before mentioned figurative plan. The above claim is forfeited under the Spanish laws, usages, and customs, for want of inhabitation and cultivation within the time prescribed by those laws and regulations; yet, as the inhabitation and cultivation appears to be very ancient, it is conceived that this claim ought to be confirmed for a reasonable quantity.

WM. HOWZE, *Register.*
G. B. DAMERON, *Receiver.*

Attest: VALENTINE DELMAS, *Clerk.*

Pat 61-78-6021 Vol _____ Page _____ C-6a Order 14553

E

Form 1388-8
June 1979

Eastern States 17945

The United States of America,

To all to whom these presents shall come, Greeting:

WHEREAS, There is now deposited in the Bureau of Land Management, evidence whereby it appears that the Private Land Claim of John Joseph Jourdan, being Claim No. 23 in the report of the Land Commissioners at the Jackson Court House (American State Papers, Gales & Seaton Edition, Volume 3, page 444), was confirmed by the Act of May 8, 1822 (3 Stat. 707), and that the said claim has been regularly surveyed and described as follows:

St. Stephens Meridian, Mississippi.

T. 8 S., R. 14 W.,

Sec. 23, All.

The area described contains 640.00 acres, according to the Official Plat of the Survey of the said Land, approved December 9, 1929, on file in the Bureau of Land Management:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT unto the said John Joseph Jourdan and to his heirs, the Land above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said John Joseph Jourdan and to his heirs and assigns forever, in accordance with the provisions of the said Act of May 8, 1822.

IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management, in accordance with the provisions of the Act of June 17, 1948 (62 Stat. 476), has, in the name of the United States, caused these letters to be made Patent, and the Seal of the Bureau to be hereunto affixed.

[SEAL]

GIVEN under my hand, in Silver Spring, Maryland the [illegible] day of JANUARY in the year of our Lord one thousand nine hundred and SEVENTY-EIGHT and of the Independence of the United States the two hundred and second.

By _____

Acting Director, Eastern States

Patent Number 61-78-6021

EXHIBIT # C-6-A
IN EVIDENCE

Eastern States Office
350 South Pickett
Alexandria, VA 22304

MAY 4 1981

Date

I hereby certify that this reproduction is a true copy of the official record on file in this office.

Authorized Signature

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Pat 1109713 V.:__ Page__ Order#_24553-C

19

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General Land Office C5547 4—1940-R

The United States of America,

To all to whom these presents shall come, Greeting:

WHEREAS, there has been deposited in the General Land Office of the United States, evidence, whereby it appears that the Private Land Claim of Pierre Carco, being Claim No. 25 in the Report of the Register and Receiver at Jackson Court House, communicated to Congress November 17, 1820, (American State Papers, Duff Green edition, volume 3, page 392), was confirmed by the third section of the Act of May 8, 1822, (3 Stat. 707), and that the said claim has been regularly surveyed and designated as Section nineteen in Township eight south of Range fourteen east of the St. Stephens Meridian, Mississippi, containing six hundred forty acres, as shown by the township plat approved December 9, 1829:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said Pierre Carco, and to his heirs, the land above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging, unto the said Pierre Carco and to his heirs and assigns forever.

This patent shall operate only as a relinquishment of title on the part of the United States and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the land.

IN TESTIMONY WHEREOF, I, Franklin D. Roosevelt, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the TWENTY-SIXTH day of JUNE in the year of our Lord one thousand nine hundred and FORTY and of the Independence of the United States the one hundred and SIXTY-FOURTH

[SEAL]

EXHIBIT # C-19 By the President: Franklin D. Roosevelt

By Jeanne M. [illegible], Secretary.

E. Adams White, Recorder of the General Land Office.

RECORD OF PATENTS: Patent Number 1108713

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16

A TRUE COPY
E. MICHAEL NECAISE
CHANCERY CLERK
BY [illegible] D.C.
HANCOCK COUNTY, MS

UNITED STATES
TO
JOEL JOURDAN, (4-208)

STATE OF MISSISSIPPI,
COUNTY OF HANCOCK,

DEPARTMENT OF THE INTERIOR,
General Land Office
Washington, D.C. Jan. 23,1902,

JTA.

I Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy of Patent issued August 29,1896, to Hoel Jourdan, on his private land claim No.28,Report No.1, of the Register & Receiver at Jackson,Miss, for Section 24, T. 8 S.R. 14 W. St. S. Mer. Mississippi, is a true and literal exemplification from the record in this office.

In Testimony Whereof, I hereunto subscribed my name, and caused the Seal of this Office to be affixed, at the City of Washington, on the day and year above written.

BINGER HERMANN
Commissioner of General Land Office.

THE UNITED STATES OF AMERICA:

To All-to-whom these presents shall come, Greeting:

WHEREAS there has been deposited in the General Land Office of the United States a certificate numbered one hundred and thirty-five ,of the Register of the land office at Jackson, Mississippi, whereby it appears that the provision of the act of Congress, approved on the eighth day of May, one thousand eight hundred and twenty-two entitled "an Act supplementary to the several acts for adjusting the claims to land and establishing land offices in the districts East of the Island of New Orleans " the claim of Hoel Jourdan,entered at number twenty-eight in report number one of the Register and Receiver, at Jackson, Court House, has been confirmed, and that the same has been surveyed and designated as section number twenty-four, in township number eight South of Range Number fourteen, West of St. Stephens Meridian in the State of Mississippi containing an area of five hundred and thirty five acres and thirty hundredths of an acre.

NOW KNOW YE, That in consideration of the premises and in conformity with said Act of Congress, the United States of America has remised, released and quit-claimed, and by these presents does remise, release and forever, quit-claim unto the said Hoel Jourdan, his heirs, assigns, or legal representatives the said land above described.

TO HAVE AND TO HOLD the same together with all the rights,privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the the said Hoel Jourdan, his heirs, assigns, or legal representatives forever.

IN TESTIMONY WHEREOF, I, Grover Cleveland, President of the United States of America, have caused these letters to be made Patent and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand at the City of Washington this twenty-ninth day of August in the year of our Lord Thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twenty-first.

L.S.

(SEAL)

BY the President Grover Cleveland,
[illegible]
[illegible]
Secretary of the General Land Office

EXHIBIT # C-16
IN EVIDENCE

U

D-8.

The instrument of which the foregoing is a record was delivered to me to be recorded on the 18th day of December A.D. 1925 6: P.M. and recorded on the 6th day of January 1926.

A.A. KENDRICK Clerk

EMILIO CUE
TO
CARROLL W. ALLEN,

STATE OF MISSISSIPPI
COUNTY OF HANCOCK

In consideration of the sum of Eighteen Hundred and Eighty & No/100 Dollars ($1880.00) cash in hand, paid, receipt of which is hereby acknowledged, said consideration being based on a basis of $40.00 per acre, for the rights hereinafter described, and conveyed, I, Emilio Cue do hereby bargain, sell and Convey unto CARROLL W. ALLEN- - - - - - - - - - - - - - - - all and every right, title and interest, which I have in and to the unexpired ninety-nine year lease on the following described lands, to-wit:

That piece of parcel of land in Hancock County, Mississippi, described as follows:

Beginning at a point on the North Bank of Bayou Lacroix where the East Boundry line of the Noel Jourdan Claim comes to said Bayou, thence North on said line to the North Line of the Sixteenth Section; thence east on said Section line to Jourdan River; thence the windings of said river, southerly to the mouth of Bayou La Croix, thence up the North Bank of said Bayou, to the place of beginning, containing 47 Acres, more or less, and being all that portion of fractional Section Sixteen, T. 8 S.R. 14 West, which lies West of Jourdan River, between said River and the Noel Jourdan Claim.

WITNESS: my signature this the 15th. day of December, 1925.

EMILIO CUE

STATE OF MISSISSIPPI,
COUNTY OF HANCOCK,

Personally appeared before me the undersigned authority in and for the aforesaid County and State, Emilio Cue who acknowledged that he signed and delivered the foregoing instrument on the day and yeartherein mentioned.

GIVEN under my hand and seal of office this the 15th day of December 1925.

(SEAL)

EVELYN HUNT
Notary Public.

The Instrument of which the foregoing is a record was delivered to me to be recorded on the 18th day of December 1925 A.D. at 6:P.M. and recorded on the 6th day of January 1926.

A.A. KENDRICK, Clerk,

W.J. CUE,
TO
CARROLL W. ALLEN,

STATE OF MISSISSIPPI,
COUNTY OF HANCOCK,

In consideration of the sum of Twenty Thousand and Four hundred fifty nine & 20/100 Dollars, ($20,459.20) cash in hand, paid, receipt of which is hereby acknowledged, I.W.J.Cue, do hereby convey andwarrant unto Carrol W. Allen, the following described land, situated in the County of Hancock, State of Mississippi, to-wit:

Pat 1028144 Vol _____ Page _____ Order# 17 C 4553-CA

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General Land Office 01967.

4—1010-R

The United States of America.

To all to whom these presents shall come, Greeting:

WHEREAS, there has been deposited in the General Land Office of the United States, evidence whereby it appears that pursuant to the Act of May 24, 1828 (4 Stat. 299), the private land claim of John Joseph Jourdan, being claim No.8 in Report No.3, dated July 15, 1829 by the Register and Receiver at Jackson Court House, Mississippi, was confirmed by the first Section of the Act of May 28, 1830 (4 Stat. 408), and that the said claim has been regularly surveyed and designated as Lot five of Section eight, the fractional Sections seventeen and twenty, and the Lot two of Section twenty-one in Township eight south of Range fourteen west of the St. Stephens Meridian, Mississippi, containing eight hundred forty-six acres and seventy-six hundredths of an acre, as shown by the supplemental plats approved August 11, 1832:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said John Joseph Jourdan, and to his heirs, the Lands above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said John Joseph Jourdan, and to his heirs and assigns forever.

IN TESTIMONY WHEREOF, I, Herbert Hoover, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the FOURTH day of JUNE in the year of our Lord one thousand nine hundred and TWENTY-NINE and of the Independence of the United States the one hundred and FIFTY-THIRD

(SEAL)

By the President: Herbert Hoover

By Viola C. Pugh, Secretary.

M. P. LeRoy

Recorder of the General Land Office

RECORD OF PATENTS: Patent Number 1028144

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Eastern States Office
350 South Pickett
Alexandria, VA 22304

MAY 4 1981
Date

I hereby certify that this reproduction is a true copy of the official record on file in this office.

Authorized Signature

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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 86-870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY, and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM U.S., INC.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

---

PETITIONERS' REPLY BRIEF

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IN THE

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PHILLIPS PETROLEUM COMPANY, and
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On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

---

PETITIONERS' REPLY BRIEF

In reply to the respondents' briefs in opposition, the petitioners state as follows:

1. The respondents' arguments serve to augment the substantiality and controversial nature of the issue before this Court

The central issue decided by the Mississippi Supreme Court is whether, at the time of statehood in 1817, the "tidally influenced non-navigable waters were included in the state owned public trsut." Pet. App. 9a. In giving an affirmative answer, the Mississippi court acknowledges that "we find no federal case expressly deciding this point of federal law." Pet. App. 9a. Accordingly it is forced to

express "our view that, as a matter of federal law, the United States granted to this State in 1817 all lands subject to the ebb and flow of the tide and up to the then mean high water level, without regard to navigability." Pet. App. 10a.

The respondents ignore the lack of any direct federal precedent on this federal issue. Instead, they try to do what the Mississippi court could not do. They try to find federal precedents that are in point and that demonstrate that the Mississippi ruling is eminently correct and "consistent with the prior decisions of this Court." See Mississippi Br. Opp. 3-18; Saga Br. Opp. 3-18. This effort does not succeed. The respondents' arguments, many of which are contestable if not flawed, simply do not respond to the Mississippi court's inability to find federal precedents. And certainly such arguments do not destroy the "certworthiness" of this case. They do not alter the fact that the Mississippi Supreme Court has created an unprecedented expansion of the public trust doctrine to encompass all non-navigable but tidally influenced waters in the uplands of a coastal state. In short, the respondents have succeeded only in adding additional fuel to the on-going controversy over the historical and conceptual elements of the public trust doctrine.

One thing is crystal clear in the opinion below. The Mississippi court has crafted an expansion of the public trust doctrine by accepting, as a matter of federal law, the "ebb and flow" test as one means for determining the boundaries of public trust wetlands. It has done so by exploiting an unusual kind of ambiguity in the precedents of this Court, such as *McGilvra* v. *Ross*, 215 U.S. 70, 78 (1909), indicating that the "ebb and flow" test "has had no place in American jurisprudence since the decision in the

case of *The Propeller Genesee Chief* v. *Fitzhugh,* 12 How. 443 (1851)."

The theory of the court below is that, when Mississippi entered the Union in 1817, such terms as "tidewaters," "ebb and flow of the tide" and similar language "dominated discussions of the trust." Pet. App. 9a. No documentation or citation of those "discussions" is given; nor is any decision of this Court cited. From those "discussions" the Mississippi court draws the conclusion that the State of Mississipi must have acquried public trust domination in 1817 as to all lands submerged under the ebb and flow of the tide – without regard to navigability. *Id.*

The court below acknowledges that this Court, sometime after 1817, engaged in what is said to be a "complete redefinition of the geographical scope of the trust. *Id.* That "complete redefinition" process included a rejection of the "ebb and flow" test in favor of the "navigability in fact" test. As expressed in *McGilvra* v. *Ross,* 215 U.S. 70, 78 (1909), the "ebb and flow" test "has had no place in American jurisprudence since the decision in the case of *The Propeller Genesee Chief* v. *Fitzhugh,* 12 How. 443 (1851)." But, in the view of the court below, that rejection of the "ebb and flow" test simply came too late to remove from the Mississippi public trust the "ebb and flow" properties that allegedly had vested in 1817.

The ultimate questions that arise out of the Mississippi court's analysis of federal decisional law respecting the "ebb and flow" test are basically two in number:

(1) Did the public trust doctrine, as a matter of federal law in 1817, encompass non-navigable "ebb and flow" wetlands that existed in Mississippi when it entered the Union?

(2) Does this Court's subsequent historical analysis of the "ebb and flow" test and its statement that the test "has had no place in American jurisprudence" at least since *The Genesee Chief* decision in 1851 mean

(a) that the "ebb and flow" test never had a place in the federal public trust jurisprudence, or

(b) that the rejection of that test operates retroactively as well as prospectively, or

(c) that the test was in place in 1817, when Mississippi entered the Union?

The answers to those questions will determine the outcome of central Question Presented to this Court by the petitioners: "Whether, at the time of Mississippi's statehood in 1817, the lands under the non-navigable but tidally influenced inland waters were conveyed by the United States to Mississippi as part of the state-owned public trust."

This problem is both important and difficult. It cannot be and should not be resolvable on the certiorari papers alone. At best, the opposing briefs of the respondents can only add to the importance of the problem and the appropriateness of granting certiorari to resolve this difficult and novel question.

The appropriateness of granting review is further augmented by the fact that the decision of the Mississippi Supreme Court in this case is the first appellate attempt to redefine federal law, or at least early federal law, so as to confer public trust dominion over non-navigable tidally influenced wetlands on on those states who joined the Union during that early period. Left unreviewed, the decision below might also have serious implications for states later admitted under the equal footing doctrine. Such a

drastic revision of the public trust doctrine clearly merits the attention of this Court.

The opinion below is well-written and thus may be influential in stirring up litigation in other states. Most states assert dominion only over navigable wetlands, having followed this Court's repudiation of the "ebb and flow" test. Some of those states, inspired by Mississippi's effort, may now seek to assert dominion over non-navigable wetlands that may have been tidally influenced when they entered the Union. Countless long-held land titles might be disrupted. And courts might be inundated with quiet title lawsuits, to say nothing of other legal relationships that might be impaired. All of which bespeaks the need for plenary review of the problem by this Court.

2. The "toothpick" test of navigability has no place in the federal public trust jurisprudence

The Mississippi court purports to establish, as an element of federal law, a theoretical toothpick under sail on the ebb and flow of the tide as a means of measuring "the inland boundaries we consider the United States set for the properties granted the State in trust." Pet. App. 12a. Neither the court nor the respodents make any claim that such a "toothpick" test finds any precedent in, or is consistent with, the decisions of this Court.

But the State of Mississippi does assert (Br. Opp. 29) that the "toothpick" test is a "simple, graphic illustration" of how the boundaries of public trust lands can be determined without the use of "any expensive and complicated survey techniques." Such an astounding statement is belied by the last paragraph of the opinion below. Pet. App. 26a. The Mississippi court there remanded the case to the Chancery Court to establish "the precise outer boundaries

of the public trust properties – today." This task, said the court, "will necessarily involve an interaction between counsel, surveyors and other experts, and the court." No mention is made in this passage about interaction with toothpicks under sail. The preliminary surveys that have been made have been prolonged and expensive, certainly at a cost in excess of the price of a six-pack of toothpicks.

As the *amicus* brief filed herein by Mr. Longino points out (p. 4), use of the Mississippi court's "toothpick" approach "would extend the public trust doctrine even to the most microscopic and temporary inlet." Such an extension would only compound the devastating impact on land owners, compelling them to employ expensive techniques to determine "the precise outer boundaries" of the extended public trust properties that are navigable only by a toothpick.

Needless to say, the respondents do not say that toothpicks can be used to establish public trust boundaries as of 1817, which is the only relevant period for determining what public trust lands were acquired by Mississippi at statehood. Not even the Mississippi Supreme Court has given thought to how that monumental historical-geophysical task can be performed.

3. The state courts below have established that petitioners' land title claims are traceable to early Spanish land grants

The State of Mississippi asserts at some length (Br. Opp. 7-11) that the land title claims of the petitioners' predecessors are based not upon early Spanish land grants as confirmed by Congress but upon "settlement and occupation of the land prior to 1813." The State attaches as an appendix to this brief certain public land records to sup-

port this assertion, although no statement is made that these records are part of the record in this case. Br. Opp. 1a-15a.

It is not clear why this matter is raised by the State, for the source of petitioners' land title claims is not directly in issue before this Court. Suffice it to say, however, that findings of fact by state courts, particularly in a land title dispute involving no federal constitutional problem, are given great if not conclusive weight by this Court. See, *e.g.*, *Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 160 (1952). Here, in affirming the Chancery Court's findings in this regard (Pet. App. 39a-41a), the Mississippi Supreme Court found (Pet. App. 2a):

> Cinque Bambini and others are vested with record title, derived from pre-statehood Spanish land grants said to date back to April 15, 1813 and to have been expressly confirmed by Acts of Congress, and from federal and state patents.

CONCLUSION

For these additional reasons, including those advanced by the *amicus* Mr. Longino and incorporated herein by reference, the petition for writ of certiorari should be granted.

Respectfully submitted,

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NO. 86-870

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY, and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

V.

STATE OF MISSISSIPPI and
SAGA PETROLEUM U.S., INC.,
Respondents.

On Petition for Writ of Certiorari
to the Mississippi Supreme Court

MOTION FOR LEAVE TO FILE BRIEF
AND
BRIEF OF AMICUS CURIAE,
ROBERT E. LONGINO, JR.

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NO. 86-870

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V.

STATE OF MISSISSIPPI and
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Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Robert Longino respectfully states to the Court and moves the Court as follows:

1. Interest of Amicus Curiae. Robert Longino is the owner of tidally affected land on the Mississippi coast. His interest in the land is described in greater detail in the attached brief, particularly in the section stating the interest of the amicus, which is incorporated here for all purposes. In most respects, he is in the same position as the landowners who are parties in this case, except that his land is a much smaller, residential plot.

2. Appearance as Amicus in Both the Trial Court and the State Supreme Court. Robert Longino learned of the trial of this case from newspaper reports. Recognizing the significance of the issues for his own residential land, he appeared in the trial court as amicus curiae. He also appeared in the Mississippi Supreme Court as amicus curiae.

3. Desirability of an Amicus Curiae Brief; Reasons for Believing that Existing Parties May Not Address All Issues. The

decision below would create chaos for coastal land titles. Robert Longino provides the perspective of a small landowner similar to people throughout the coastal area who will need to defend their homes. This perspective is not provided by the parties. For example, on information and belief, the parties in this case spent many hundreds of thousands of dollars merely surveying a short section of coastline, but Robert Longino simply could not afford such a survey.

4. *Avoidance of Unnecessary Duplication.* This brief has been written with an awareness of the content of the Petition for Certiorari, in an effort to avoid unnecessary duplication.

5. *Requests for Consent; Failure to Obtain Consent of All Parties; Filing of Motion.* Movant has sought, but has been unable to obtain, the consent of all parties, and hence the filing of this Motion.

For these reasons, Robert Longino prays that the Court grant him leave to appear as amicus curiae.

Respectfully submitted,

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NO. 86-870

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY, and
CINQUE BAMBINI PARTNERSHIP,

Petitioners,

V.

STATE OF MISSISSIPPI and
SAGA PETROLEUM U.S., INC.,

Respondents.

BRIEF OF AMICUS CURIAE, ROBERT E. LONGINO, JR.

INTEREST OF AMICUS CURIAE ROBERT E. LONGINO, OWNER OF A SMALL PLOT OF RESIDENTIAL LAND ON THE MISSISSIPPI COAST

Robert E. Longino, Jr. is the owner of a small tract of property in Harrison County, Mississippi, located upon a branch of the Tchoutacabouffa River, a waterway subject to the influence of the tide. Robert Longino learned of this case through newspaper coverage, attended portions of the trial, recognized the implications for his property, and decided to present his views as an amicus curiae to the Mississippi trial court in order to protect his interests. He also appeared in the Mississippi Supreme Court. Having attempted to protect his land in each of the lower courts, he now appears as amicus curiae to present his views to this Court.

Robert Longino is a lifelong citizen of Mississippi, residing at Biloxi. He inherited the land here described from his father, through other relatives. Through the years, he has faithfully paid taxes on the property and saved the tax receipts. He has conveyed a portion of the acreage inherited by him to his two sons. It is a place of great natural beauty, containing a residence with large picture windows facing the water.

The interface of Robert Longino's property with the river includes meanders, inlets, and accretions typical of the area geography. A fill has been made across an inlet to allow access to a boat landing. None of these meanders, inlets, or artificial structures are shown on published maps. Yet Robert Longino could not easily afford a sophisticated survey of this property, particularly if a survey of every tidally influenced inlet is required. He believes his interests in this regard are typical of those of landowners of similar size. Thus, although situated at the opposite end of the state from the land in question in the case at bar, and although his small parcel is dwarfed by the land claimed by petitioners and respondents, he fears his interest may be harmed by the state's position here.

Robert Longino learned of this case through newspaper reports. He arranged to attend the trial of the case. This experience left him more convinced of the importance of the case to him and others similarly situated, and he therefore decided he should get his views before the trial court. This amicus curiae brief is the ultimate result.

SUMMARY OF ARGUMENT

This brief does not attempt to duplicate the detailed case law arguments expected to be made by the parties. Instead, it attempts to explain practical and legal difficulties created by the State's position for the party landowners and others, including small landowners such as Robert Longino.

The public trust doctrine is not susceptible of being understood from dictum taken out of context. For example, it is not confined only to very large bodies that are "great arms of the

sea," despite literal dicta to that effect, nor is it so unreasonably broad as to extend literally into every nook and cranny into which "the tide ebbs and flows." Adoption of the unreasonably broad, "toothpick boat" approach of the Mississippi court would plunge land titles into chaos, frustrate landowners' settled and legitimate expectations, and prevent reasonable management, maintenance or development of coastal property. The energies of virtually every coastal landowner would be channeled into resistance against the overreaching of the state, all at enormous, crushing cost. The federal questions presented here are substantial.

REASONS FOR GRANTING THE WRIT

IF INTERPRETED IN ACCORDANCE WITH THE MISSISSIPPI SUPREME COURT'S "TOOTHPICK BOAT" APPROACH, SO AS TO REACH MINISCULE NON-NAVIGABLE INLETS, THE PUBLIC TRUST DOCTRINE WOULD HAVE SERIOUS ADVERSE EFFECTS FOR SMALL COASTAL LANDOWNERS.

A. As this Case Shows, Dicta in the Prior Decisions, if Read out of Context, Would Support Either an Unreasonably Broad, or an Unreasonably Narrow, Public Trust Doctrine, and this Court Should Clarify Those Dicta.

The public trust doctrine is not the subject of clear statement in any one narrow phrase. It is, instead, an idea that must be understood from its historical purposes. If one were to select dicta out of context, one could support a wide variety of different approaches to the public trust doctrine, ranging from the extremely broad to the extremely narrow.

If dicta from the cases were followed literally, for example, one could reach all of the following inconsistent interpretations of the public trust doctrine:*

1. That it extends only to the "great arms of the sea." *E.g., Steamboat Magnolia v. Marshall*, 39 Miss. 109, 119 (1860). If this approach were taken, only such large bodies as the Bay of St. Louis would be included, but not such important waterways as the Jourdan River. Although supportable by dicta from the cases, this view of the public trust doctrine is probably unreasonably narrow.

2. That it extends to the great arms of the sea, plus "navigable" waters. *E.g., The Daniel Ball v. United States*, 77 U.S. (10 Wall.) 557 (1870). Navigability may be measured by various factors, such as the ability to accommodate a vessel of a certain draw, or length of the waterway, or commercial navigability in practice. Case law to support these views is available.

3. That it extends wherever "the tide ebbs and flows." *E.g., Martin v. The Lessee of Waddell*, 41 U.S. 367 (1842). A slavishly literal view of this dictum, such as the Mississippi court's "toothpick" approach, would extend the public trust doctrine even to the most microscopic and temporary inlet.

Each of these interpretations, in addition to others, can be supported by selected dicta. The point, however, is that selec-

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* Amici have not repeated the briefing undertaken by Appellants. A full statement of the basis for these interpretations is to be found in their brief.

tion of dictum while ignoring the historical nature of the public trust doctrine would be erroneous. The Mississippi court heavily stressed the "wherever the tide ebbs and flows" dictum; it ignored case law expressly excluding "little rivers and streams," *see The Daniel Ball v. United States, supra,* and it ignored the fact that no case, either Mississippi or federal, has ever applied the doctrine to a case in which minor inlets, as opposed to great commercial waterways, were in issue.

B. Unreasonably Broad Interpretation of the Public Trust Doctrine Would Throw Coastal Land Titles into Chaos.

It is with good reason that case law excludes small streams from public trust. This case has demonstrated the collossal expense necessary to establish the boundaries of coastal land. The proof has been technical and scientific. It has required teams of specially trained personnel, and it has required lengthy expert testimony in court. This proof does not include the complexities that would be created by tracing the course of every bayou, inlet, drainage canal, pond, or other watercourse that may cross the boundary line.

A rule of law that costs more to apply than the value of the rights it controls is unlikely to be a good rule of law. This is particularly true in the area of land titles. Clear legal rules, providing for unambiguous determination of title without undue expense, are desirable. Particularly for the small landowner, the survey evidence necessary to make the required determination for every small inlet would be impracticably expensive. The result would be that the small landowner would not know what he owned and what he did not, and title to land all along the Mississippi Gulf Coast would be thrown into chaos.

Furthermore, it is desirable in the land title area to have rules establishing boundaries that are relatively permanent. A landowner might be faced with a lengthy survey and court battle to determine the boundaries of every small inlet, lasting a decade or longer, and once he had finished, there would be substantial likelihood that the course of one or more of the inlets would have shifted, necessitating the performance of the process all

over again. A rule of law requiring repeated expensive determinations, rather than settling the issue once and for all, would not be a good rule of law.

In fact, when one attempts to chart the course of the most miniscule inlets, one is faced with the problem that their exact complexion may change almost daily. A high rain might change the course of a channel. Even acquatic plants or animals might change the shape of the boundary. These examples are not farfetched at all, when one considers that the surveyor must make judgments as to the shape of the mean high-tide line. If he is determined to chart the course of every small rivulet, as distinguished from obtaining an accurate measure of major waterways, his judgment may differ from day to day according to minor changes in natural phenomena, which thus may result in major changes in land titles. This result would be undesirable.

Furthermore, in many places along the coast, landowners have erected bulkheads obliterating evidence of small inlets, leaving land titles virtually undeterminable if they depend on every small course into which the tide may "ebb and flow." Much property along the Mississippi Gulf Coast is covered by residential landowners in subdivisions, who are particularly likely to establish bulkheads. In such a case, it is probably easy to determine the course of the major waterway upon which the property sits, but if the landowner were required to prove that there was never a filling of the smallest kind of inlet back through recorded history, the right of most coastal residential landowners to occupy the property they reasonably believe is privately their own would be in serious jeopardy.

C. *Unreasonably Broad Interpretation of the Public Trust Doctrine Would Deny Effect to the Settled, Legitimate Expectations of Small Private Landowners Concerning Their Property Boundaries.*

As a consequence of the chaos into which it would throw coastal land titles, unreasonably broad interpretation of the public trust doctrine would mean that land which small private landowners believed, even quite reasonably, that they owned,

would not in fact be owned by them. Portions of land bought and paid for would not have belonged to the seller, and hence would not belong to the buyer. Citizens would be faced with loss of title to land as to which they had paid full value and could trace title back to a patent from the state. In fact, the present case is just such a case.

D. Unreasonably Broad Interpretation of the Public Trust Doctrine Would Prevent Rational Management of Land Near the Coastline.

Unreasonably broad interpretation of the public trust doctrine would mean that the landowner had no right even to enter strips of property that may traverse his land. Although a narrow inlet might run the entire length of his property, dividing it into two parcels, he would have no right to create a pathway or bridge across it, could not cut weeds or undergrowth in it, and could not perform most of the tasks that a responsible coastal landowner would perform. If structures on the land (such as the landowner's own home) were undermined by the shifting of an inlet the landowner would have no right to shore up his property. He would have no legal means of eradicating pests that might breed in the narrow strip of land that he did not own. And, of course, the filling of even the most miniscule rivulet, the alteration of its course, or its modification in any way would be illegal, and the State would presumably be under a disability even to permit it.

Additionally, applying a rule by which small inlets traversing a landowner's property were not owned by him would impede reasonably and necessary development, including that of mineral resources. Amicus curiae Robert Longino, for example, has been approached by potential oil and gas lessees interested in his property. If it were necessary to exclude small strips of land traversing his property or that of a landowner similarly situated, the result would be to fragment the land, require considerably greater expenses for lease acquisition, require more complicated operating agreements, and, in general, impose additional costs upon mineral development. The same result

would occur from either large or small surface development of the property.

E. The Problem is National in Scope.

The following excerpt from Porro and Teleky, *Marshland Title Dilemma: A Tidal Phenomenon*, 3 Seton Hall L. Rev. 323, 331 (1972), describes the situation in another state using the "toothpick" approach and shows that the problem is national in scope:

> Presently, a backlog of cases which relate to the tidelands problem is still awaiting a trial date, and even though recent legislation has authorized the addition of six judges to handle these matters, this is not an effective solution. A case-by-case judicial determination regarding the title to approximately 244,000 acres of tideland is an overwhelming task. Extensive proofs will be required in each instance, including comprehsnsive map displays, extensive soil analyses, vegetation and pollen analyses, topographical data, historical and tidal data, scientific and expert testimony regarding the natural characteristics of the marsh, artificial changes, salt water intrusion—in short, a pattern of expensive and extensive litigation.

Petitioners' marine surveyor, Paul O'Hargan, testified on the basis of comparative experience in Florida and New Jersey that a lawsuit was needed in New Jersey anytime an individual was interested in defining his title in the coastal zone, resulting in a "chaotic" situation. (Miss. Appendix 135-36).

CONCLUSION

The Court should grant the writ of certiorari.

Respectfully submitted,

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MOTION FILED

MAR 18 1987

No. 86-870

(7)

In The Supreme Court of the United States

October Term, 1986

PHILLIPS PETROLEUM COMPANY, AND
CINQUE BAMBINI PARTNERSHIP

PETITIONERS

VERSUS

STATE OF MISSISSIPPI AND
SAGA PETROLEUM U.S., INC.

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

MOTION AND MEMORANDUM IN SUPPORT OF THE MOTION BY THE STATE OF MISSISSIPPI FOR DISMISSAL OF WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI GRANTED BY THE SUPREME COURT OF THE UNITED STATES

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EDITOR'S NOTE

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NO. 86-870

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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PETITIONERS

versus

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RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO
THE SUPREME COURT OF MISSISSIPPI

MOTION BY THE STATE OF MISSISSIPPI FOR DISMISSAL OF WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI GRANTED BY THE SUPREME COURT OF THE UNITED STATES

1. On February 23, 1987, the Supreme Court of the United States granted Petitioners' request for a writ of certiorari to the Supreme Court of the State of Mississippi, to review the

decision of that court in the case of Cinque Bambini Partnership, et al v. State of Mississippi, et al, 491 So.2d 508 (Miss. 1986). In that case, the Mississippi Supreme Court held that effective upon statehood on March 1, 1817, the United States granted to the State of Mississippi in trust all lands to which the United States then held title (including their mineral and other subsurface resources) subject to the ebb and flow of the tide regardless of commercial navigability. The Mississippi court specifically held that certain tidelands in dispute, located in Hancock County, Mississippi, belonged to the State as part of the state-owned public trust.

2. Petitioners had posed the question to this Court "whether at the

time of Mississippi's statehood in 1817, the lands under the non-navigable but tidally influenced inland waters were conveyed by the United States to Mississippi as part of the state-owned public trust."

3. Respondent State of Mississippi respectfully calls the attention of the Court to the explicit language of the Submerged Lands Act, 43 U.S.C. Sections 1301-1315, passed by Congress on May 22, 1953. This Act was previously uncited to the Court by Respondent. Respondent State of Mississippi submits that certain provisions of this Act, i.e., Section 1301(a)(1), (2), (3) and Section 1311 (a) (1953) as discussed in the attached Memorandum in Support of this Motion, are determinative of the question posed to this Court by Petitioners and therefore

render consideration of such question moot.

4. The State of Mississippi, by its undersigned counsel, now moves the Court for dismissal of the Writ of Certiorari to the Supreme Court of Mississippi, as improvidently granted.

Respectfully submitted,

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NO. 86-870

IN THE SUPREME COURT OF THE UNITED STATES

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PHILLIPS PETROLEUM COMPANY, and
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ON PETITION FOR A WRIT OF CERTIORARI
TO
THE SUPREME COURT OF MISSISSIPPI

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI GRANTED BY THE SUPREME COURT OF THE UNITED STATES

In its decision in Cinque Bambini Partnership, et al v. State of Mississippi, et al, 491 So.2d 508, 516 (Miss. 1986), the Supreme Court of Mississippi held:

> ". . . [e]ffective upon statehood on March 1, 1817, we understand federal law to provide that the United States granted to the State of Mississippi in trust all lands, to which the United States then held title, including their mineral and other subsurface resources, subject to the ebb and flow of the tide below the then mean high water level -- regardless of whether the water courses were commercially navigable at the time of Mississippi's admission into the Union, regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea. Similarly granted were the beds and streams of all non-tidal waters which were navigable in fact in 1817. . . ."

That court also held specifically that certain tidelands in dispute located in Hancock County, Mississippi, belonged to the State as part of the state-owned public trust.

Petitioners applied to the United States Supreme Court for a Writ of Certiorari to review the above decision,

challenging the title of the State to all tidelands under the "ebb and flow test" of the common law. They posed the question to this Court:

> "Whether at the time of Mississippi's statehood in 1817, the lands under the non-navigable but tidally influenced inland waters were conveyed by the United States to Mississippi as part of the state-owned public trust."

The entire thrust of Petitioner's argument is that a distinction should be made between submerged lands which are navigable in fact, i.e., commercially navigable, and those which are navigable in the legal sense.

Congress clearly addressed this issue on May 23, 1953, when it passed 43 U.S.C. §1301, et. seq. (1953), commonly known as the Submerged Lands Act. At the time of the passage of the Act, there existed an imperative need to determine

whether the individual States or the United States Federal Government has ownership and control of the submerged lands, due to the increasing litigation between the United States and the several States concerning the development of natural resources, i.e., oil and gas off the coastline. The purpose of the Submerged Lands Act was to confirm and establish the rights and claims of the States to the lands and resources beneath navigable waters within their boundaries and extending offshore three miles.

43 U.S.C. 1301(a), (1953), explicitly identifies three distinct types of lands as lands within the definition of "lands beneath navigable waters." The Act states:

> "(a) The term 'lands beneath navigable waters' means--

"(1) All lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter modified by accretion, erosion, and reliction;

"(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

"(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;"
[Emphasis Added].

Significantly the wording of the Act shows that "lands beneath navigable water" were not being granted to the States in 1953, but that Congress was merely recognizing and confirming the States' pre-existing rights in such tidelands. With passage of the Submerged Lands Act, Congress merely codified the principles utilized to identify the trust property as previously set forth in more than thirty (30) United States Supreme Court decisions applying the "ebb and flow" common law test beginning with Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845); Weber v. Harbor Commissioners, 85 U.S. (18 Wall.) 57 (1873); Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9 (1935). See

also, Legislative History, Appendix I, H.R. No. 17782, 83rd Cong., 1st Sess. 2, reprinted in 1953 U.S. Code Cong. and Admin. News. 1385, 1428-1429.

Consequently, under the Submerged Lands Act, the only test applicable to State ownership of tidelands is the common law "ebb and flow" test which terminates at the "mean high tide" mark. There is no mention by Congress of a "navigability-in-fact test" in tidal waters.

Ownership of all such tide lands up to the "mean high tide" mark is with the respective States as shown by 43 U.S.C. 1311(a), (1953):

> "It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and

> (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law . . . are . . . recognized, confirmed, established and vested in and assigned to the respective States . . . " [Emphasis Added]

The Submerged Lands Act previously was not cited to the Court by this Respondent. A portion of the Act was cited by Petitioner to highlight the State ownership of lands under "navigable waters," however, Petitioner failed to identify the parameters of the definition of "navigable waters" under the Submerged Lands Act.

Mississippi submits to the Court that the decision of the Mississippi Supreme Court below is in complete accord with the prior case law of this Court and subsequent Congressional Acts based upon such precedent as manifested by the Submerged Lands Act and its legislative

history. Additionally, the actions of Mississippi are in accordance with the actions of at least five other states which have analyzed the matter in legal controversies and subsequently determined that State ownership of the tidelands was determined by the "ebb and flow of the tide" up to the "line of the mean high tide." Each of the five states have spoken to this issue in the following cases: Louisiana in State v. Bayou Johnson Oyster Co., 130 La. 604, 58 So. 405 (1912) wherein Louisiana received the soil under the ebb and flow of the tide; Maryland in Wagner v. City of Baltimore, 210 Md. 615, 124 A.2d 815 (1956) where the Maryland court determined that the test of navigability is whether waters are subject to the ebb and flow of the tide; New Jersey, Schultz v. Wilson, 44

N.J. Super. 591, 131 A.2d 415 (1957) - the State has title to submerged lands without regard to navigability; in New York, Fulton Light, Heat & Power Co. v. State, 200 N.Y. 400, 94 N.E. 199 (1911), the State retained title to property subject to the ebb and flow of the tide; and in the State of Texas, City of Galveston v. Menard, 23 Tx. 349 (1859) and later in Lorino v. Crawford Packing Co., 142 Tx. 51, 175 S.W.2d 410 (1943), bays, inlets and other waters along the Gulf Coast subject to the ebb and flow of the tide are "navigable waters."

For the foregoing reasons, Mississippi respectfully prays that the Writ of Certiorari to the Supreme Court

of Mississippi be dismissed as improvidently granted.

Respectfully submitted,

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BY: Robert Franklin Sp
ROBERT FRANKLIN SPENCER

CERTIFICATE OF SERVICE

I, Robert Franklin Spencer, Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date caused to be mailed, postage prepaid, a true and correct copy of the above and foregoing **MOTION BY THE STATE OF MISSISSIPPI FOR DISMISSAL OF WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI GRANTED BY THE SUPREME COURT OF THE UNITED STATES** and **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI GRANTED BY THE SUPREME COURT OF THE UNITED STATES** to the following:

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This the 18th day of March, 1987.

Robert Franklin Spencer

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Supreme Court, U.S.
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CLERK

No. 86-870

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM, U.S., INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

PETITIONERS' MEMORANDUM OPPOSING STATE OF MISSISSIPPI'S MOTION TO DISMISS WRIT AS IMPROVIDENTLY GRANTED

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IN THE

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PETITIONERS' MEMORANDUM OPPOSING STATE OF MISSISSIPPI'S MOTION TO DISMISS WRIT AS IMPROVIDENTLY GRANTED

The State of Mississippi has filed what purports to be a motion to dismiss the writ of certiorari as improvidently granted. In fact, it is nothing more than a request for reconsideration of the grant of certiorari. Such a request should be denied.

To begin with, it is not the role of any respondent to seek dismissal of a writ as improvidently granted. That is a discretionary function of the Justices of this Court, acting *sua sponte* and without the advice or suggestion of any litigant. Motions by respondents have uniformly been denied. *United States Department of State* v. *Washington Post*

Co., 455 U.S. 936 (1982); *Insurance Corporation of Ireland* v. *Compagnie Des Bauxites*, 454 U.S. 1078 (1981).

Moreover, dismissal of a writ once granted normally occurs only after the Court has intensively studied the issues and the record following – not preceding – full briefing and oral argument by the parties. Then some or all of the Justices may change their minds and conclude that the conditions originally thought to justify granting the writ are not in fact present. Such changed conditions may range from misperceptions as to the totality of the critical facts to misunderstandings as to the true questions at issue. *See* R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice*, Sec. 5.15 (6th ed. 1986) (listing factors articulated by the Court in finding improvident grants); Blumstein, *The Supreme Court's Jurisdiction – Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 Vanderbilt L. Rev. 895 (1973) (noting the impact of the dismissal process on the Rule of Four).

Suffice it to say that the motion filed by the State of Mississippi says nothing that would justify a dismissal of the writ, even assuming that the State has standing to seek dismissal. There is no claim that the grant of certiorari was triggered by some kind of misrepresentation made to the Court by the petitioners or any other party. Nor is there any suggestion that this Court suffers from a misconception of the critical facts or issues, or of the considerations that presumably led the Court to grant certiorari.

The State of Mississippi says only that it "submits to the Court that the decisions of the Mississippi Supreme Court below is in complete accord with the prior case law of this Court and subsequent Congressional Acts based upon such precedent as manifested by the Submerged Lands Act and its legislative history . . . [and is] in accordance with the actions of at least five other states which have analyzed the

matter in legal controversies." Supporting memorandum, pp. 12-13. Such a "submission" speaks only to the now-mooted problem whether certiorari should have been granted or denied; it does not address the question whether the grant should now be deemed improvident.

Everything set forth in the motion and the memorandum was said, or certainly could have been said, in the State's opposition to the certiorari petition. The State's present "submission" is rendered even more untenable by its frank concession that the Submerged Lands Act, a 1953 enactment upon which the State places much of its "submission," was "previously uncited to the Court" by the State in its opposition brief. Motion, p. 3; Memorandum, p. 12. No excuse is offered for this failure. Nor is there any reason to believe that the grant of certiorari is in any way rendered improvident by the State's failure to explain to the Court what the State conceives to be the meaning and importance of the Submerged Lands Act, a statute that was cited by the petitioners in their petition for certiorari (p. 16).

Petitioners do not propose to answer the arguments now advanced by the State. Such matters can best be addressed in the petitioners' forthcoming brief on the merits. And the State will be quite free to repeat and elaborate upon these matters in its brief on the merits. In the meantime, the State's effort to relitigate the certiorari grant, under the masquerade of a motion to dismiss the writ as improvidently granted, should be resisted.

CONCLUSION

The State's motion to dismiss the writ of certiorari as improvidently granted should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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(9)

No. 86-870

IN THE

Supreme Court of the United States

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Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

RESPONSE TO PETITIONERS' MEMORANDUM OPPOSING STATE OF MISSISSIPPI'S MOTION TO DISMISS WRIT AS IMPROVIDENTLY GRANTED

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On Writ of Certiorari to the Supreme Court of Mississippi

RESPONSE TO PETITIONERS' MEMORANDUM OPPOSING STATE OF MISSISSIPPI'S MOTION TO DISMISS WRIT AS IMPROVIDENTLY GRANTED

Counsel of Record for Respondent State of Mississippi humbly and respectfully apologizes to the Court if he has chosen the wrong vehicle for presenting a previously overlooked Congressional Act to the Court. Respondent is quite aware that once certiorari has been granted it is extremely rare for the Court to dismiss the writ; however, Respondent is also aware that the time of the Court is extremely precious and that time spent on a moot question, if that be the case, could be better utilized elsewhere.

No excuse can be offered for failure to mention the Act at an earlier stage, however the importance of the Congressional authority cited to the Court and its impact on the question presented by Petitioners were judged by Re-

spondents to outweigh the concern of additional infringement on the limited time of the Court and inconvenience to Petitioners.

Additionally, Petitioners are quite right in their response to Respondent's Motion that Counsel for the Respondent did not assert that the ". . . grant of certiorari was triggered by some kind of misrepresentation made to the Court by the Petitioners . . . ." Petitioners' Memorandum, p. 2. Counsel for the Respondent are unwilling to take that giant, insulting step. However, the effect of the text and citation in Petitioners' Brief is the same as if there were such a misrepresentation; that is, a patently inadequate explanation of the parameters of the definition of "navigable waters" under the Submerged Lands Act.

The purpose of Respondent's Motion was simply to call to the Court's attention the applicable provisions of the Submerged Lands Act and consequently the alleged mootness of the question presented by Petitioners.

Respectfully submitted,

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Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 28, 1986
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Feb. 23, 1979	Appearance and Separate Answer of Phillips Petroleum Company.
Apr. 3, 1979	Answer of defendant Mississippi State Highway Commission.
June 7, 1979	General Demurrer.
July 9, 1979	Findings and Rulings of the Court.
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Nov. 13, 1979	Answer of defendants, State of Mississippi.
Nov. 13, 1979	Answer of defendants, Saga Petroleum.
April 28, 1982	Findings and Ruling of the Chancery Court.
Sept. 16, 1982	Final Judgment and Decree of Chancery Court.
Jan. 9, 1984	Appeal filed in Supreme Court of Mississippi, together with 20 volumes of the record.
Sept. 27, 1984	Oral argument before Supreme Court of Mississippi.
May 14, 1986	Opinion of Mississippi Supreme Court rendered, affirming in part, reversing in part, and remanding.

May 14, 1986	Judgment of Mississippi Supreme Court entered on Minute Book.
July 30, 1986	Petition for Rehearing denied; original opinion modified.
Aug. 1, 1986	Mandate issued.
Dec. 12, 1986	Notice of Filing Petition for Writ of Certiorari in Supreme Court of the United States, received from Joseph F. Spaniol, Jr., Clerk.

IN THE CHANCERY COURT OF HANCOCK COUNTY, MISSISSIPPI

CINQUE BAMBINI PARTNERSHIP CARROLL W. ALLEN, LYDIA CARROLL HAMILTON ALLEN, HARRY B. KELLEHER, SPOONER PETROLEUM COMPANY and ENSERCH EXPLORATION, INC. — COMPLAINANTS

NO. 14,178

VS.

STATE OF MISSISSIPPI, ET AL. — DEFENDANTS

BILL TO QUIET AND CONFIRM TITLE AND TO CANCEL CLOUDS ON TITLE

COMES NOW the Cinque Bambini Partnership, Carroll W. Allen, Jr., Lydia Carroll Hamilton Allen, Harry B. Kelleher, Spooner Petroleum Company and Enserch Exploration, Inc., and bring this their Bill to Quiet and Confirm Title and to Cancel Clouds on Title. The defendants are The State of Mississippi, Saga Petroleum United States Inc., and others who are identified subsequently. In support of this Bill the Complainants state the following:

COMPLAINANTS

1. The Complainant, Cinque Bambini Partnership, hereinafter referred to as Bambini, is a general partnership, established pursuant to Mississippi law. Said partnership is composed of five genral partners: Evelyn Crump Johnson, Helen Crump Cutler, Joseph R. Crump, Armand B. Crump and Donald E. Crump. It owns and manages real property in Hancock County, Mississippi.

2. Carroll W. Allen, Jr. is an adult resident citizen of Hancock County, Mississippi. His sister, Lydia Carroll

Hamilton Allen, is an adult resident citizen of New Orleans, Louisiana. Carroll and Lydia Allen are hereinafter sometimes collectively referred to as "the Allens."

3. Harry B. Kelleher, hereinafter referred to as Kelleher, is an adult resident citizen of New Orleans, Louisiana who owns and maintains real property in Hancock County, Mississippi.

4. Spooner Petroleum Company, hereinafter referred to as "Spooner," is a limited partnership, organized and existing pursuant to the laws of the State of Mississippi.

5. Enserch Exploration, Inc., is a foreign corporation duly qualified to do business, and doing business, in the State of Mississippi.

DEFENDANTS

6. The State of Mississippi is a state created by Act of Congress in 1817. It can be served with process by service upon the Honorable A.F. Summer, Attorney General of the State of Mississippi, at his office in the Carroll Gartin Justice Building, Jackson, Mississippi.

7. Saga Petroleum United States Inc., hereinafter sometimes referred to as Saga, is a foreign corporation which is doing business in the State of Mississippi and which is qualified to do business in the State of Mississippi. Its resident agent for service of process is C.T. Corporation System, 118 North Congress Street, Jackson, Mississippi, 39205.

8. Marshall R. Young Oil Company is a foreign corporation which is doing business in the State of Mississippi and which is qualified to do business in the State of Mississippi. Its resident agent for service of process is C.T. Corporation System, 118 North Congress Street, Jackson, Mississippi, 39205.

9. Public Service Company of Oklahoma, is an Oklahoma corporation which is doing business in the State of Mississippi and which is qualified to do business in the State of Mississippi. Its resident agent for service of process is C.T. Corporation System, 118 North Congress Street, Jackson, Mississippi, 39205.

10. Varibus Corporation, is a Texas corporation which is doing business in the State of Mississippi and which is qualified to do business in the State of Mississippi. Its resident agent for service of process is C.T. Corporation System, 118 North Congress Street, Jackson, Mississippi, 39205.

11. Elliott Davis, as trustee of the Elliott Davis mineral trust. Elliott Davis is a non-resident of the State of Mississippi. He is a resident of the State of Oklahoma. His post office and street address is 4444 S. Zunis, Tulsa, Oklahoma.

12. Barry M. Davis, as trustee of the Barry M. Davis Revocable Trust. He is a non-resident of the State of Mississippi. His post office and street address is 2514 South Terwilliger, Tulsa, Oklahoma.

13. Lee H. Davis, as trustee of the Lee H. Davis Revocable Trust. He is a non-resident of the State of Mississippi. His post office and street address is 2230 East 37th Street, Tulsa, Oklahoma.

14. Sagapart U.S. Inc., is a Delaware corporation which is doing business in the State of Mississippi and which is qualified to do business in the State of Mississippi. Its resident agent for service of process is C.T. Corporation System, 118 North Congress Street, Jackson, Mississippi, 39205.

15. Union Oil Company of California, hereinafter sometimes referred to as Union, is a foreign corporation which is doing business in the State of Mississippi and which is qualified to do business in the State of Mississippi. Its resident agent for service of process is C.T. Corporation System, 118 North Congress Street, Jackson, Mississippi 39205. This part is joined as a necessary, proper and interested party as is more specifically set out subsequently. The Complainants make no claim against this party, but allege that its leasehold rights may be affected by this suit.

16. Phillips Petroleum Company, hereinafter sometimes referred to as Phillips, is a foreign corporation which is doing business in the State of Mississippi and which is qualified to do business in the State of Mississippi. Its resident agent for service of process is U.S. Corporation Company, 616 Unifirst Federal Building, Jackson, Mississippi. This party is joined as a necesssary, proper and interested party as is more specifically set out subsequently. The Complainants make no claim against this party, but allege that its leasehold rights may be affected by this suit.

17. Mississippi Power Company is a Mississippi Utility Company which is licensed to do business in Mississippi and whose agent for service of process is W.L. Wilson, 2992 West Beach, Gulfport, Mississippi. This defendant is joined as a necessary proper and interested party as is more specifically set out in Exhibit B, ¶ 68, page 24; and on Exhibit C. The complainants make no claim against this party, but allege that its interests may be affected by this suit.

18. Hancock County, is a body corporate and politic which may be served with process by service upon the Honorable A.F. Summer, Attorney General of the State

of Mississippi, at his office in the Carroll Gartin Justice Building, Jackson, Mississippi. This defendant is joined as a necessary proper and interested party as is more specifically set out on Exhibit C hereto. The complainants make no claim against this party, but allege that its interests may be affected by this suit.

19. Defendant Wesley Haas is a resident citizen of Hancock County, Mississippi, who may be served with process at Kiln Supermarket, Kiln, Mississippi. This defendant is joined as a necessary proper and interested party. The complainants make no claim against this party but allege that his interest in an unrecorded lease of Bambini crop land on the subject real property may be affected by this suit.

20. James Travirca, is a resident citizen of Hancock County, Mississippi, who may be served with process at Fenton Road, Kiln, Mississippi. This defendant is joined as a necesary proper and interested party. The complainants make no claim against this party but allege that his interest in an unrecorded lease of Bambini crop land on the subject real property may be affected by this suit.

21. Kent Dawerstreet, is a resident cititzen of Hancock County, Mississippi, who may be served with process at his home which is located on Route 3 at Holly Bluff in Hancock County, Mississippi. This defendant is joined as a necessary proper and interested party in that he leases from Bambini a house which is located on the subject real property. No claim is made against this defendant.

22. Mr. and Mrs. Bruce Woods, resident citizens of Hancock County, Mississippi, may be served with process at their home located at Route 3, Holly Bluff in Hancock County, Mississippi. These defendants are joined as a necessary proper and interested parties in that they lesae

from Bambini a house which is located on the subject real property. No claim is made against this defendant.

23. Melvin Wainwright, a resident citizen of Hancock County, Mississippi, may be served with process at his home which is known as the Bayou La Croix House, Hancock County, Mississippi. This defendant is joined as a necessary proper and interested party in that he leases from Bambini a house which is located on the subject real property. No claim is made against this defendant.

24. Coast Materials Company may be served with process by service of process upon J.F. Boardman, 2809 19th Street, Gulfport, Mississippi. This defendant is joined as a necessary proper and interested party as a surface lessee of the Bambini partnership. No claim is made against this defendant.

25. South Central Bell Telephone Company, which is the successor to Southern Bell Telephone and Telegraph Company, may be served with process by service upon Roger M. Flynt, Jr., 248 East Capitol Street, Jackson, Mississippi. This defendant is joined as a necessary proper and interested party as is more specifically set out on Exhibit C hereto. The complainants make no claim against this party, but allege that its interests may be affected by this suit.

26. Mississippi State Highway Commission is a body corporate and politic which may be served with process by service upon the Honorable A.F. Summer, Attorney General of the State of Mississippi at his office in the Carroll Gartin Justice Building, Jackson, Mississippi. This defendant is joined as a necessary proper and interested party as is more specifically set out on Exhibit C hereto. The complainants make no claim against this party, but allege that its interests may be affected by this suit.

27. Though after diligent search and inquiry, the Complainants know of no other claimants, any and all other parties who have a claim against the subject property whether legal or equitable, are hereby made defendants.

TITLE AND DERAIGNMENT

28. The real property which is the subject of this suit is owned by and is in the exclusive possession of the complainants Bambini, Kelleher, and the Allens as is more specifically stated in paragraph 29 and subject only to the interests of certain other parties as is specifically stated in paragraph 29. The subject real property is that tract of land located in Hancock County, Mississippi, Township 8 South, Range 14 Weste, which is composed of the following parcels:

A. Fractional Section 5, lots 1, 2, 3 and 4.

B. John J. Jourdan Claim No. 23.

C. Lots 3, 4 and 5 of the Fractional Section 4, less and except that tract of land described as follows:

> Begin at a point where the lot line between lots 1 and 2 of the private division of the John J. Jourdan claim No. 23 intersects the east line of that claim (said line between lots 1 and 2 being 27.55 chains north of and parallel to a line connecting the south line of fractional sections 4 and 5) thence running north 13° west 1080' along the claim line, thence east 750' more or less to the west bank of the Jordan River, thence southwesterly along the western bank of the river to a poitn 300' more or less due east of the point of beginning, thence west 300' more or less to the point of beginning.

D. Lots 4 and 5, section 9.

E. All that part of Noel Jourdan Claim No. 28, north of Bayou La Croix.

F. All that part of the John J. Jourdan Claim No. 8 (sometimes referred to as No. 3) lying east of the Bay-Kiln Road.

G. All that part of Pierre Carco Claim No. 25 lying east of the Bay-Kiln Road, less and except the following described parcel: Begin at a stake on the section line between Sections 19 and 20, Township 8 North, Range 14 West, which is 40 chains and 9 links South of the common corner of Sections 18, 17, 19 and 20; thence South 67° West 240 feet; thence South 23° East 228 feet; thence North 67° East 142 feet to the section line between Sections 19 and 20; thence North on the section line to the point of beginning.

H. Lot 1, that part of Lot 2 lying East of the Bay-Kiln Road, S ½ of Lot 3, and that part of the S ½ of Lot 4 lying East of the Bay-Kiln Road, Section 8.

The subject of real property is also defined by the boundary indicated on the plat attached hereto as Exhibit A and incorporated herein by reference.

29. As is stated in detail in the deraignment of title Exhibit B hereto:

A. The complainant Bambini owns the surface and an undivided ½ mineral interest in the subject real property, less and except that estate owned by the complainant Kelleher and the surface estate owned by the Mississippi Power Company and subject to the oil, gas and mineral leases described in sub-paragraphs D, E and F, the surface easements and right-of-ways identified on Exhibit C attached hereto, those surface leases referenced in paragraphs 19-24 above, and the declarations of pooling described on Exhibit D attached hereto and incorporated by

reference. That surface estate owned by Mississippi Power Company is described as follows:

> Commence at the Northeast corner of the Pierre Carco Claim No. 25 and run South 75° 14' West 397.9 feet to an iron rod for the point of beginning; thence running South 12° 54' East 300 feet to an iron rod; thence South 77° 06' West to an iron rod in the East boundary of the Bay-Kiln Road; thence along said road North 6° 49' East 236.8 feet; thence continuing along said road North 10° 14' East 84.4 feet to an iron rod; thence North 77° 06' East 300 feet, more or less, to the point of beginning, containing 2.45 acres, more or less.

B. The complainant Kelleher owns the surface and an undivided ½ mineral interest in that part of the subject real property described as follows:

> that tract of land comprising part of the John J. Jourdan Claim No. 23 and part of Section 4 described as follows:
>
> Beginning at an iron stake set 23 feet North of the corner of Sections $\frac{5}{8}\ \frac{4}{9}$, of Township 8 S. Range 14 W., (said section corner also being the upper northwest corner of the Noel Jourdan Claim); thence running N. 52° W. 642 feet to an iron stake set on the eastern line of the public road; thence northerly along said road 2050 feet, more or less, to fork of roads; thence easterly along the southern line of the right fork of said road 910 feet, more or less, to the eastern line of the J.J. Jourdan Claim; thence along said claim line S. 12° E. 523 feet to an iron stake set for the southwest corner of land of Birghenti, where the line between Lots 1 & 2 of the division of John J.

Jourdan Claim intersects said claim line; thence east 300 feet, more or less, to the East bank of Jourdan River; thence southerly, along the meanderings of said river to a point 23 feet North of the section line between Sections 4 & 9; thence West to the place of beginning. Being a part of the J.J. Jourdan Claim and a part of Lot No. 5 of Fractional Section 4; all in Township 8 S. Range 14 West in Hancock County, Mississippi; less and except that 1.83 acre tract described as follows:

Beginning at an iron stake set 23 feet North of the corner of Sections 5, 4, 8 and 9 of Township 8 South, Range 14 West (said section corner also being the upper northwest corner of the Noel Jourdan claim); thence running North 52° West 510.3 feet to an iron stake for a fence corner; thence running South 75° 10' East 434.9 feet along the fence to an iron stake set at an angle in the fence; thence running South 59° 40' East 400.2 feet along the fence to an iron stake at a fence corner; thence running West 363.4 feet to the point of beginning.

Said estate is subject to the oil, gas and mineral lease described in subparagraph H, the easements and right-of-ways identified on Exhibit C, and the declarations of pooling described on Exhibit D.

C. The complainants, the Allens, collectively own an undivided ½ mineral interest, with each individually owning an undivided ¼ mineral interest, in all of the subject real property, subject to the oil, gas and mineral lease described in subparagraph D and the easements and right-of-ways identified on Exhibit C, and the declarations of pooling described on Exhibit D.

D. Enserch Exploration, Inc., successor in title to Lonestar Producing Company, has a leasehold interest in the oil, gas and minerals owned by the Allens in the subject real propety. Said estate being established by that oil, gas and mineral lease dated July 13, 1972 and recorded in Oil and Gas Book 23 page 297 of the land records on file in the Chancery Clerk's office in Hancock County, Mississippi. Its interest is subject to the declarations of pooling described on Exhibit D.

E. Union Oil Company of California has a leasehold interest in the oil, gas and minerals owned by Bambini in the subject real property which lies north of a line joining the south boundary of Fractional Section 5 and the south boundary of Fractional Section 4, but subject to that assignment described in subparagraph F; said estate was established by that oil, gas and mineral lease dated March 15, 1976 and recorded in Oil and Gas Book 30, pages 60, 67 and 76 of the land records on file in the Chancery Clerk's office in Hancock County, Mississippi. Its interest is subject to the declarations of pooling described on Exhibit D.

F. Phillips Petroleum Company has a 50% leasehold interest in the oil, gas and minerals leased by Union as described in subparagraph E above. Said estate was established by an assignment of a ½ interest in the said Union lease. This assignment is dated March 30, 1977 and is recorded in Oil and Gas Book 32 at page 106 of the land records on file in the Chancery Clerk's office in Hancock County, Mississippi. Its interest is subject to the declarations of pooling described on Exhibit D.

G. Spooner Petroleum Company has a leasehold interest in the oil, gas and minerals owned by Bambini in the subject real property lying south of a line joining the south boundary of Fractional Section 5 and the south boundary

of Fractional Section 4. Said estate was established by that oil, gas and mineral lease dated June 3, 1977 and recorded in Oil and Gas Book 31 at page 359 and re-recorded in Oil and Gas Book 31 at page 434 of the land records on file in the Chancery Clerk's office in Hancock County, Mississippi. Its interest is subject to the declarations of pooling described on Exhibit D.

H. Spooner Petroleum Company also has a leasehold interest in the oil, gas and minerals owned by Kelleher in the subject real property. Said estate was established by that oil, gas and mineral lease dated July 6, 1977, and recorded in Oil and Gas Book 32 at page 450 of the land records on file in the Chancery Clerk's office in Hancock County, Mississippi. Its interest is subject to the declaration of pooling described on Exhibit D.

I. There are certain surface easements and right of ways across the subject real property which are specifically identified on Exhibit C to the complaint which is incorporated herein by reference.

J. There are certain unrecorded surface leases in effect between Bambini, the lessor, and the defendant lessees identified in paragraphs 19-24 above.

30. The Complainants specifically deraign their title to the said property on Exhibit B attached hereto and incorporated herein by reference. As shown on Exhibit B, the title to all of the subject property passed from the sovereign as follows:

A. Prior to becoming a part of the Mississippi Territory of the United States, the subject property was under the dominion of the Spanish government and a part of West Florida. Considering these lands as a part of the colony of Louisiana and, thus, conveyed by the treaty concluded at

Paris on the 30th day of April, 1803, the United States annexed to the Mississippi Territory the lands lying south of thirty-first degree latitutde, by act of Congress dated May 14, 1812, entitled "An act to enlarge the boundries of the Mississippi Territory." The United States occupied the lands south of the thirty-first degree latitude pursuant to an act of Congress dated February 12, 1813, entitled "An Act authorizing the President of the United States to take possession of a tract of country lying south of the Mississippi Territory and west of the river Perdido."

B. The State of Mississippi was created from the western part of the Mississippi Territory, which included the subject lands, by an act of Congress dated March 1, 1817, entitled "An Act to enable the people of the western part of the Mississippi Territory to form a constitution and State government, and for the admission of such State into the Union, on an equal footing with the original States." By this act all unappropriated lands within the territory remained "at the sole and entire disposition of the United States."

C. John J. Jourdan, Noel Jourdan and Pierre Carco settled and claimed parts of the subject property prior to April 15, 1813, while these lands were under Spanish government. Pursuant to the provisions of an act of Congress dated March 3, 1819, entitled "An Act for adjusting the claims to land, and establishing land offices, in the districts east of the island of New Orleans," Noel Jourdan, John J. Jourdan and Pierre Carco presented their respective land claims and these claims were duly surveyed. The John J. Jourdan Claim No. 23, the Noel Jourdan Claim No. 28 and the Pierre Carco Claim No. 25 were confirmed by act of Congress dated May 8, 1822, entitled "An Act supplementary to the several acts for adjusting the claims to land, and establishing land offices, in the districts east of the island of New Orleans." The John J. Jourdan Claim

No. 8 (also referred to as Claim No. 3) was confirmed by act of Congress dated May 28, 1830, entitled "An Act to confirm certain claims to lands in the district of Jackson Courthouse, in the State of Mississippi." The United States subsequently issued patents on each of these claims.

D. Lots 1 and 2 of Section 8 were patented to individuals by the United States.

E. Lots 1, 2, 3 and 4 of Section 5; Lots 3, 4 and 5 of Section 4; Lots 4 and 5 of Section 9; and, Lots 3 and 4 of Section 8 were patented to the State of Mississippi and were patented to individuals by the State of Mississippi.

31. As is stated in detail and with specificity in the deraignment of title, Exhibit B hereto:

A. The title to the subject real property, both surface and minerals, through mesne conveyances, was vested in Dr. Carroll W. Allen during the years 1925 and 1926. Dr. Allen died on April 14, 1934 and by the terms of his will he devised 2/16 of the subject property to his sister Rose Allen Ellis and his brother Henry Martin Allen. The remainder of the subject property descended to his sole and only heirs at law, his children Lydia Carroll Hamilton Allen and Carrroll W. Allen, Jr., and his widow Lydia Fayers Freeman Allen. Subsequently, in 1936, Rose Allen Ellis and Henry Martin Allen, conveyed their interests to Dr. Allen's widow and children. Then in 1946, Mrs. Lydia Fayers Freeman Allen and her children, Lydia and Carroll Jr., conveyed in fee the subject property to James L. Crump, excepting and reserving a 1/2 interest in the oil, gas and minerals.

B. On July 25, 1947 James L. Crump conveyed a tract of land being a part of the J.J. Jourdan claim 23 and a part of Lot 5 of Fractional Section 4 to Harry B. Kelleher and on September 1, 1950 Harry B. Kelleher conveyed a

1.83 acre portion of said tract back to James L. Crump, leaving Kelleher with the surface estate and ½ the minerals in the remaining tract.

C. Mrs. Allen died during, or before, 1954 and under the terms of her last will and testament her interest in the minerals was devised to the complainants, Lydia Carroll Hamilton Allen and Carroll W. Allen, Jr. Thus, they became owners of ½ of the subject minerals each having a ¼ interest therein.

D. James L. Crump died testate on April 25, 1963. Through the terms of his will and the expiration of certain trust provisions the title to the subject property, with the exception of the Kelleher interest and the Allen minerals, became vested in Evelyn Crump Johnson, Helen Crump Cutler, Joseph R. Crump, Armand B. Crump and Donald E. Crump in 1971; and, then by warranty deed, they conveyed the property to the Cinque Bambini partnership on November 25, 1973.

E. Bambini, the Allens and Kelleher leased their minerals as specifically stated in paragraph 29 and on Exhibit B hereto.

32. In 1925 and 1926 when the said Carroll W. Allen acquired title to the subject real property as particularly set out on Exhibit B, he entered into the hostile, actual, open, notorious, exclusive, continuous and undisputed possession of the subject real property under deeds from Kate Posey Cutting on February 1, 1926, from Hillary H. Posey on March 10, 1926, and from R.J. Williams Land Company on December 31, 1925. He and his heirs and successors remained thereafter in the hostile, actual, open, notorious, exclusive, continuous, undisputed and peaceful possession of said land by building fences, building houses and other structures, farming, raising cattle, managing

and harvesting timber and otherwise claiming it against all the world, exercising every class and kind of ownership, use and occupancy of which the same was acceptable; and, they personally have so remained in exclusive possession and control under color of title as aforesaid until the present.

CLOUDS

33. The Mississippi Mineral Lease Commission, an agency of the State of Mississippi, acting for and on behalf of the State of Mississippi, on August 19, 1977, signed, sealed and delivered to Saga, four oil, gas and mineral leases in Township 8 South, Range 14 West of Hancock County, Mississippi, more particularly described as follows:

A. That lease recorded in Oil and Gas Book 32 page 575 of the land records on file in the Chancery Clerk's office in Hancock County, Mississippi, covering the following described acreage:

> All State-owned lands subject to the ebb and flow of the tide and which are below the watermark of ordinary (mean) high tide (both tidelands and submerged lands) in the following claims and/or sections, or portions thereof, estimated to comprise 568.15 acres:

TOWNSHIP 8 SOUTH, RANGE 14 WEST

Tract 1:	Sections 3, 4 and part of John J. Jourdan Claim 23 (said claim being also Section 23), which lies North of a line connecting the North line of Section 8 and the North line of Noel Jourdan Claim 28 (said claim being also Section 24).	568.15 acres

B. That lease recorded in Oil and Gas Book 32 page 577 of the land records on file in the Chancery Clerk's office in Hancock County, Mississippi, covering the following described acreage:

> All State-owned lands subject to the ebb and flow of the tide and which are below the water-mark of ordinary (mean) high tide (both tide-lands and submerged lands) in the following claims and/or sections, or portions thereof, estimated to comprise 238.57 acres:

TOWNSHIP 8 SOUTH, RANGE 14 WEST

Tract 2: Section 8, Noel Jourdan Claim 28 (said claim being also Section 24), that part of John J. Jourdan Claim 23 (said claim being also Section 23), which lies South of a straight line connecting the North line of Section 8 with the North line of Noel Jourdan Claim 28 (said claim also being Section 24), and that part of John J. Jourdan Claim 3 (said claim being also Section 17), which lies North of a straight line connecting the South line of Section 18 and the South line of Noel Jourdan Claim 28 (said claim being also Section 24). 238.57 acres

C. That lease recorded in Oil and Gas Book 32 page 579 of the land records on file in the Chancery Clerk's office in Hancock County, Mississippi, covering the following described acreage:

> All State-owned lands subject to the ebb and flow of the tide and which are below the water-

mark of ordinary (mean) high tide, (both tidelands and submerged lands) in the following claims and/or sections, or portions thereof, estimated to comprise 575.73 acres:

TOWNSHIP 8 SOUTH, RANGE 14 WEST

Tract 3: Sections 9, 10 and Noel Jourdan Claim 31. 575.73 acres

D. That lease recorded in Oil and Gas Book 32 page 585 of the land records on file in the Chancery Clerk's office in Hancock County, Mississippi, covering the following described acreage:

All State-owned lands subject to the ebb and flow of the tide and which are below the watermark of ordinary (mean) high tide (both tidelands and submerged lands) in the following claims and/or sections, or portions thereof, estimated to comprise 541.26 acres:

TOWNSHIP 8 SOUTH, RANGE 14 WEST

Tract 6: That part of John J. Jourdan Claim 3 (said claim being also Section 17), which lies South of a straight line connecting the South line of Section 18 and the South line of Noel Jourdan Claim 28 (said claim being also Section 24), and that part of Joseph Favre Claim 31 (said claim being also Section 40), which lies East of Four Dollar Bayou. 541.26 acres

Saga assigned a 50% interest in the foregoing leases to Marshall R. Young Oil Company on December 14, 1977. Said assignment is recorded in Oil and Gas Book 33 at page 192. According to an instrument of record in Han-

cock County Oil and Gas Book 36 page 279, it appears that, on or before January 10, 1978, Saga conveyed a portion of its interest in these leases to the defendants Public Service Company of Oklahoma; Varibus Corporation; Elliott Davis, as trustee of the Elliott Davis mineral trust; Barry M. Davis, as trsutee of the Barry M. Davis Revocable Trust; Lee H. Davis, as trustee of the Lee H. Davis Revocable Trust and Sagapart U.S. Inc.

E. The grant of the foregoing leases with the general descriptions set out therein and the general estimate of acreage provided on the face of them constitute an assertion of a claim or pretention to the title of complainants' to the subject real property as described in paragraph 16 above and exhibit A hereto. Said leases cast doubt and suspicion on the title of the complainants who are in exclusive possession and control of the subject real property and, who are the real owners. The granting of these leases, which are all filed of record in the land records of Hancock County, create serious and substantial clouds on the title of the complainants to the subject real property, as defined on exhibit A hereto, and in paragraph 27 above.

34. The complainants allege that the only parties having any valid title to or claim against the subject real property are those stated in paragraph 29 above.

PRAYER

35. The complainants pray that summons may issue to the defendants by service upon them personally or upon their agents for service of process as aforesaid, and that publication for the other defendants, if any, may be made as provided by law in such cases, requiring the said defendants to answer this Bill, but not under oath, answer under

oath being specifically waived, at the next regular term of this Court; and, that on the Final hearing that the Court shall order, adjudge, decree and confirm that:

A. The complainant Bambini owns the surface and an undivided ½ mineral interest in the subject real property, less and except that estate owned by the complainant Kelleher and the surface estate owned by the Mississippi Power Company and subject to the oil, gas and mineral leases described in sub-paragraphs D, E and F, the surface easements and right-of-ways identified on Exhibit C attached hereto, those surface leases identified in paragraphs 19-24 above and the declarations of pooling described on Exhibit D attached hereto. That surface estate owned by Mississippi Power Company is described as follows:

> Commence at the Northeast corner of the Pierre Carco Claim No. 25 and run South 75° 14' West 397.9 feet to an iron rod for the point of beginning; thence running South 12° 54' East 300 feet to an iron rod; thence South 77° 06' West to an iron rod in the East boundary of the Bay-Kiln Road; thence along said road North 6° 49' East 236.8 feet; thence continuing along said road North 10° 14' East 84.4 feet to an iron rod; thence North 77° 06' East 300 feet, more or less, to the point of beginning, containing 2.45 acres, more or less.

B. The complainant Kelleher owns the surface and an undivided ½ mineral interest in that part of the subject real property described as follows:

> that tract of land comprising part of the John J. Jourdan Claim No. 23 and part of Section 4 described as follows:

Beginning at an iron stake set 23 feet North of the corner of Sections $\frac{5\ 4}{8\ 9}$, of Township 8 S. Range 14 W., (said section corner also being the upper northwest corner of the Noel Jourdan Claim); thence running N. 52° W. 642 feet to an iron stake set on the eastern line of the public road; thence northerly along said road 2050 feet, more or less, to fork of roads; thence easterly along the southern line of the right fork of said road 910 feet, more or less, to the eastern line of the J.J. Jourdan Claim; thence along said claim line S. 12° E. 523 feet to an iron stake set for the southwest corner of land of Birghenti, where the line between Lots 1 & 2 of the division of John J. Jourdan Claim intersects said claim line; thence east 300 feet, more or less, to the East Bank of Jourdan River; thence southerly, along the meanderings of said river to a point 23 feet North of the section line between Sections 4 & 9; thence West to the place of beginning. Being a part of the J.J. Jourdan Claim and a part of Lot No. 5 of Fractional section 4; all in Township 8 S. Range 14 West in Hancock County, Mississippi; less and except that 1.83 acre tract described as follows:

Beginning at an iron stake set 23 feet North of the corner of Sections 5, 4, 8 and 9 of Township 8 South, Range 14 West (said section corner also being the upper northwest corner of the Noel Jourdan claim); thence running North 52° West 510.3 feet to an iron stake for a fence corner; thence running South 75° 10' East 434.9 feet along the fence to an iron stake set at an angle in the fence; thence running South 59° 40' East 400.2 feet along the fence to an iron stake at a

fence corner; thence running West 363.4 feet to the point of beginning.

Said estate is subject to the oil, gas and mineral lease described in subparagraph H and the easements and right-of-ways identified on Exhibit C, attached hereto.

C. The complainants, the Allens, collectively own an undivided ½ mineral interest, with each individual owning an undivided ¼ mineral interest, in all of the subject real property, subject to the oil, gas and mineral lease described in subparagraph D and the easements and right-of-ways identified on Exhibit C, attached hereto.

D. Enserch Exploration, Inc., successor in title to Lonestar Producing Company, has a leasehold interest in the oil, gas and minerals owned by the Allens in the subject real property. Said estate was established by that oil, gas and mineral lease dated July 13, 1972 and recorded in Oil and Gas Book 23 page 297 of the land records on file in the Chancery Clerk's office in Hancock County, Mississippi.

E. Union Oil Company of California has a leasehold interest in the oil, gas and minerals owned by Bambini in the subject real property which lies north of a line joining the south boundary of Fractional Section 5 and the south boundary of Fractional Section 4, but subject to that assignment described in subparagraph F. Said estate was established by that oil, gas and mineral lease dated March 15, 1976 and recorded in Oil and Gas Book 30, pages 60, 67 and 76 of the land records on file in the Chancery Clerk's office in Hancock County, Mississippi.

F. Phillips Petroleum Company has a 50% leasehold interest in the oil, gas and minerals leased by Union as described in subparagraph E above. Said estate was established by an assignment of a ½ interest in the said Union

lease. This assignment is dated March 30, 1977 and is recorded in Oil and Gas Book 32 at page 106 of the land records on file in the Chancery Clerk's office in Hancock County, Mississippi.

G. Spooner Petroleum Company has a leasehold interest in the oil, gas and minerals owned by Bambini in the subject real property lying south of a line joining the south boundary of Fractional Section 5 and the south boundary of Fractional Section 4. Said estate was established by that oil, gas and mineral lease dated June 3, 1977 and recorded in Oil and Gas Book 31 at page 359 and re-recorded in Oil and Gas Book 31 at page 434 of the land records on file in the Chancery Clerk's office in Hancock County, Mississippi.

H. Spooner Petroleum Company also has a leasehold interest in the oil, gas and minerals owned by Kelleher in the subject real property. Said estate was established by that oil, gas and mineral lease dated July 6, 1977, and recorded in Oil and Gas Book 32 at page 450 of the land records on file in the Chancery Clerk's office in Hancock County, Mississippi.

I. That there are certain surface easements and right-of-ways across the subject real property as specified in Exhibit C to the complaint.

J. That there are certain unrecorded surface leases in effect between Bambini, the lessor, and the defendant lessees identified in paragraphs 19-24 of the Complaint.

K. That the State of Mississippi's claims and pretentions to mineral rights in the subject real property are void, and specifically, the oil, gas and mineral leases described in paragraph 32 as being those recorded in Oil anbd Gas Book 32 at page 575; Book 32 page 577; Book 32 page 579 and Book 32 page 585 are void and of no effect

to the extent that they purport to lease any of the subject real property.

L. That there are no valid claims, whether legal or equitable, against the subject real property other than those specifically identified in subparagraphs A-J above. Any other claim constitutes a Cloud on the valid title of the complainants and is void and of no effect.

M. That costs of this action shall be assessed against the State of Mississippi.

Should complainants be mistaken in the relief requested then complainants pray for such other and more general relief as is appropriate in the premises.

Dated this the 30th day of November, 1978.

Respectfully submitted,

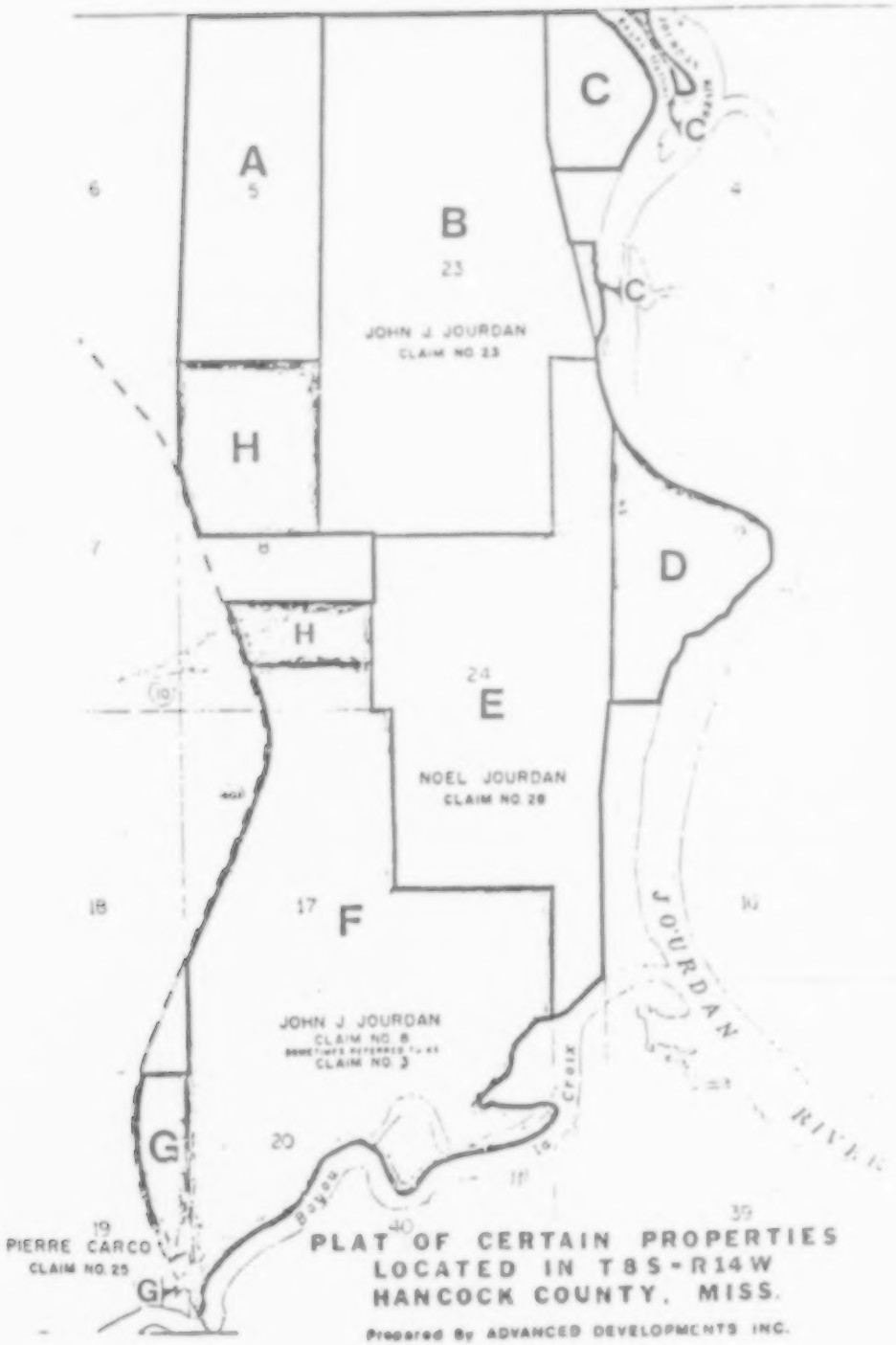
CINQUE BAMBINI PARTNERSHIP, CARROLL W. ALLEN, LYDIA CARROLL HAMILTON ALLEN, HARRY B. KELLEHER, SPOONER PETROLEUM COMPANY and ENSERCH EXPLORATION, INC.

[Names of counsel omitted]

[Jurat omitted]

FILED
DEC 5, 1978

EXHIBIT "A"



PLAT OF CERTAIN PROPERTIES
LOCATED IN T8S-R14W
HANCOCK COUNTY, MISS.

Prepared By ADVANCED DEVELOPMENTS INC.

IN THE CHANCERY COURT OF HANCOCK COUNTY, MISSISSIPPI

APPEARANCE AND SEPARATE ANSWER OF PHILLIPS PETROLEUM COMPANY

And now comes Phillips Petroleum Company, one of the Defendants, and in answer to the Bill to Quiet and Confirm Title and to Cancel Clouds on Title, answering, says:

1.

This Defendant is unable to either admit or deny the allegations of Paragraphs 1 to 15, inclusive, and 17 to 28, inclusive, of the Bill because it does not have sufficient information. It does admit the allegations of Paragraph 16 of the Bill.

2.

This Defendant neither admits nor denies the allegations of Paragraph 29, because of lack of information, but demands strict proof should such allegations affect the claims of this Defendant answering here; except, however, it admits the allegations of Paragraph 39-F and affirms that Phillips Petroleum Company has a 50% leasehold interest in the oil, gas and minerals leased by Union as described in paragraph 29-F of the Bill, and admits that the estate was established by Assignment of a 1/2 interest in the Union lease referred to, and admits the Assignment is dated March 30, 1977, and recorded in Oil and Gas Book 32 at page 106 of the Land Records on file in the Chancery Clerk's office in Hancock County, Mississippi; and, that the interest is subject to the declarations of pooling as described in Exhibit B to the Bill.

3.

This Defendant neither admits nor denies the allegations contained in Paragraph 30 of the Bill, but demands strict proof should such allegations affect the claims of this Defendant answering here.

4.

This Defendant neither admits nor denies the allegations contained in Paragraph 31 of the Bill, but demands strict proof should such allegations affect the claims of this Defendant answering here.

5.

This Defendant neither admits nor denies the allegations contained in Paragraph 32 of the Bill, but demands strict proof should such allegations affect the claims of this Defendant answering here.

6.

This Defendant admits the allegations contained in Paragraph 33 of the Bill.

7.

This Defendant neither admits nor denies the allegations contained in Paragraph 34 of the Bill, but demands strict proof should such allegations affect the claims of this Defendant answering here.

AND NOW, having fully answered the said Bill, and with reference to the Prayer thereof, this Defendant prays that the Court adjudicate that it has a 50% leasehold interest in the oil, gas and minerals leased by Union as described in sub-paragraph 29-E of the Bill, and that the Court adjudicate that such estate was established by

Assignment of a 1/2 interest in the Union lease referred to, which Assignment is recorded in Book 32, at page 106 of the Land Records on file in the Chancery Clerk's office in Hancock County, Mississippi; and this Defendant prays for general relief.

PHILLIPS PETROLEUM COMPANY, Defendant

[Names of counsel omitted]

[Jurat omitted]

FILED
FEB 23, 1979

IN THE CHANCERY COURT OF
HANCOCK COUNTY, MISSISSIPPI

[Caption omitted]

**ANSWER OF DEFENDANT
STATE OF MISSISSIPPI**

COMES NOW the State of Mississippi, Defendant, by A.F. Summer, duly qualified and elected Attorney General of the State of Mississippi, and answering the Bill to Quiet and Confirm Title and to Cancel Clouds on Title herein says:

COMPLAINANTS

1. Defendant, lacking any knowledge of the allegations in Paragraph 1 of the Bill, denies same on information and belief and demands proof thereof.

2. Defendant, lacking any knowledge of the allegations in Paragraph 2 of the Bill, denies same on information and belief and demands proof thereof.

3. Defendant, lacking any knowledge of the allegations in Paragraph 3 of the Bill, denies same on information and belief and demands proof thereof.

4. Defendant, lacking any knowledge of the allegations in Paragraph 4 of the Bill, denies same on information and belief and demands proof thereof.

5. Defendant, lacking any knowledge of the allegations in Paragraph 5 of the Bill, denies same on information and belief and demands proof thereof.

DEFENDANTS

6. Defendant admits the allegations of Paragraph 6 of the Bill.

7. Defendant, lacking any knowledge of the allegations in Paragraph 7 of the Bill, denies same on information and belief.

8. Defendant, lacking any knowledge of the allegations in Paragraph 9 of the Bill, denies same on information and belief.

9. Defendant, lacking any knowledge of the allegations in Paragraph 9 of the Bill, denies same on information and belief.

10. Defendant, lacking any knowledge of the allegations in Paragraph 10 of the Bill, denies same on information and belief.

11. Defendant, lacking any knowledge of the allegations in Paragraph 11 of the Bill, denies same on information and belief.

12. Defendant, lacking any knowledge of the allegations in Paragraph 12 of the Bill, denies same on information and belief.

13. Defendant, lacking any knowledge of the allegations in Paragraph 13 of the Bill, denies same on information and belief.

14. Defendant, lacking any knowledge of the allegations in Paragraph 14 of the Bill, denies same on information and belief.

15. Defendant, lacking any knowledge of the allegations in Paragraph 15 of the Bill, denies same on information and belief.

16. Defendant, lacking any knowledge of the allegations in Paragraph 16 of the Bill, denies same on information and belief.

17. Defendant, lacking any knowledge of the allegations in Paragraph 17 of the Bill, denies same on information and belief.

18. Answering the first sentence of Paragraph 18 of the Bill, Defendant admits that Hancock County is a body corporate and politic but denies that it may be served with process by service upon the Honorable A.F. Summer, Attorney General of the State of Mississippi, at his office in the Carroll Gartin Justice Building, Jackson, Mississippi. Answering the remainder of said Paragrpah 18, Defendant, lacking any knowledge of the allegations therein, denies same on information and belief and demands proof thereof.

19. Defendant, lacking any knowledge of the allegations in Paragraph 19 of the Bill, denies same on information and belief.

20. Defendant, lacking any knowledge of the allegations in Paragraph 20 of the Bill, denies same on information and belief.

21. Defendant, lacking any knowledge of the allegations in Paragraph 21 of the Bill, denies same on information and belief.

22. Defendant, lacking any knowledge of the allegations in Paragraph 22 of the Bill, denies same on information and belief.

23. Defendant, lacking any knowledge of the allegations in Paragraph 23 of the Bill, denies same on information and belief.

24. Defendant, lacking any knowledge of the allegations in Paragraph 24 of the Bill, denies same on information and belief.

25. Defendant, lacking any knowledge of the allegations in Paragraph 25 of the Bill, denies same on information and belief.

26. Answering the first sentence of Paragraph 26 of the Bill, Defendant admits that the Mississippi State Highway Commission is a body corporate and politic but denies that it may be served with process by service upon the Honorable A.F. Summer, Attorney General of the State of Mississippi, at his office in the Carroll Gartin Justice Building, Jackson, Mississippi. Answering the remainder of said Paragraph 26, Defendant, lacking any knowledge of the allegations therein, denies same on information and belief and demands proof thereof.

27. Defendant, lacking any knowledge of the allegations in Paragraph 19 of the Bill, denies same on information and belief.

TITLE AND DERAIGNMENT

28. Defendant, lacking any knowledge of the allegations in Paragraph 28 of the Bill, denies same on information and belief.

29. Defendant, lacking any knowledge of the allegations in Paragraph 29 of the Bill, denies same on information and belief.

30. Answering Paragraph 30 of the Bill, Defendant admits the allegations in Sub-paragraphs A and B of said Paragraph, but as to all remaining allegations of said Paragraph 30, Defendant, lacking any knowledge of said allegations, denies same on information and belief and demands proof thereof.

31. Defendant, lacking any knowledge of the allega-

tions in Paragraph 31 of the Bill, denies same on information and belief.

32. Defendant, lacking any knowledge of the allegations in Paragraph 32 of the Bill, denies same on information and belief.

CLOUDS

33. Defendant admits the allegations of Paragraph 33 of the Bill that the Mississippi Mineral Lease Commission, on August 19, 1977, signed, sealed and delivered to Saga four oil and gas leases in Township 8 South, Range 14 West of Hancock County, as described in Sub-paragraphs A, B, C and D of said Paragraph 33, but, lacking any knowledge of the remaining allegations of Sub-paragraph D of said Paragraph, denies same on information and belief and demands proof thereof. Defendant denies the allegations of Sub-paragraph E of said Paragraph 33 and demands proof thereof.

34. Defendant denies the allegations of Paragraph 34 of the Bill.

AFFIRMATIVE DEFENSE

Answering affirmatively Defendant would show that the property described in Paragraph 33, being four leases granted by the Mississippi Mineral Lease Commission to tidelands in Township 8 South, Range 24 West, in Hancock County, Mississippi, more particularly described in Sub-paragrfaphs A, B, C and D of said Paragraph, is tidelands held in public trust for the people by the State of Mississippi. Such property is public trust property and is not subject to conveyance to private persons for private purposes by either the State of Mississippi or the United

States Government. Therefore, the Complainants never became vesteed with any title to said tidelands and consequently said tidelands constitute no cloud on the title to their lands.

WHEREFORE, PREMISES CONSIDERED, having fully answered this Bill, Defendant prays that this Answer be received and filed and that upon final hearing hereon this Honorable Court will enter a decreee dismissing the Bill against this Defendant, at the cost of Complainants.

Respectfully submitted,

A.F. SUMMER, ATTORNEY GENERAL
STATE OF MISSISSIPPI

[Names of other counsel omitted]

[Certificate of Service omitted]

IN THE CHANCERY COURT OF
HANCOCK COUNTY, MISSISSIPPI

[Caption omitted]

ANSWER OF DEFENDANTS, SAGA PETROLEUM U.S. INC., ET AL, TO BILL TO QUIET AND CONFIRM TITLE AND TO CANCEL CLOUDS ON TITLE

Comes now Saga Petroleum U.S. Inc., Marshall R. Young Oil Co., Sagapart U.S. Inc., Public Service Company of Oklahoma, Varibus Corporation, Elliott Davis, as trustee of the Elliott Davis Mineral Trust, Barry M. Davis, as trustee of the Barry M. Davis Revocable Trust, and Lee H. Davis, as trustee of the Lee H. Davis Revocable Trust, eight of the Respondents in the above styled and numbered cause, and answering the Bill to Quiet and Confirm Title and to Cancel Clouds on Title filed herein says:

COMPLAINANTS

1. Defendants, lacking any knowledge of the allegations in Paragraph 1 of the Bill, deny same on information and belief and demand strict proof thereof.

2. Defendants, lacking any knowledge of the allegations in Paragraph 2 of the Bill, deny same on information and belief and demand strict proof thereof.

3. Defendants, lacking any knowledge of the allegations in Paragraph 3 of the Bill, deny same on information and belief and demand strict proof thereof.

4. Defendants, lacking any knowledge of the allegations in Paragraph 2 of the Bill, deny same on information and belief and demand strict proof thereof.

5. Defendants, lacking any knowledge of the allegations in Paragraph 5 of the Bill, deny same on information and belief and demand strict proof thereof.

DEFENDANTS

6. Defendants admit the allegations of Paragraph 6 of the Bill.

7. Defendants admit the allegations of Paragraph 7 of the Bill with the exception that the correct name of this defendant is Saga Petroleum U.S. Inc., rather than the name set forth in this paragraph of the Bill.

8. Defendants admit the allegations of Paragraph 8 of the Bill with the exception that the correct name of this defendant is Marshall R. Young Oil Co., rather than the name set forth in this paragraph of the Bill.

9. Defendants admit the allegations of Paragraph 9 of the Bill.

10. Defendants admit the allegations of Paragraph 10 of the Bill.

11. Defendants admit the allegations of Paragraph 11 of the Bill.

12. Defendants admit the allegations of Paragaph 12 of the Bill.

13. Defendants admit the allegations of Paragraph 13 of the Bill.

14. Defendants admit the allegations of Paragraph 14 of the Bill.

15. Defendants, lacking any knowledge of the allegations in Paragraph 15 of the Bill, deny same on information and belief.

16. Defendants, lacking any knowledge of the allegations in Paragraph 16 of the Bill, deny same on information and belief.

17. Defendants, lacking any knowledge of the allegations in Paragraph 17 of the Bill, deny same on information and belief.

18. Defendants, lacking any knowledge of the allegations in Paragraph 18 of the Bill, deny same on information and belief.

19. Defendants, lacking any knowledge of the allegations in Paragraph 19 of the Bill, deny same on information and belief.

20. Defendants, lacking any knowledge of the allegations in Paragraph 20 of the Bill, deny same on information and belief.

21. Defendants, lacking any knowledge of the allegations in Paragraph 21 of the Bill, deny same on information and belief.

22. Defendants, lacking any knowledge of the allegations in Paragraph 22 of the Bill, deny same on information and belief.

23. Defendants, lacking any knowledge of the allegations in Paragraph 23 of the Bill, deny same on information and belief.

24. Defendants, lacking any knowledge of the allegations in Paragraph 24 of the Bill, deny same on information and belief.

25. Defendants, lacking any knowledge of the allegations in Paragraph 25 of the Bill, deny same on information and belief.

26. Defendants, lacking any knowledge of the allegations in Paragraph 26 of the Bill, deny same on information and belief.

27. Defendants, lacking any knowledge of the allegations in Paragraph 27 of the Bill, deny same on information and belief.

TITLE AND DERAIGNMENT

28. Answering the first sentence of this paragraph, defendants deny that the complainants own or are in exclusive possession of any real property which is actually State-owned lands subject to the ebb and flow of the tide and which are below the watermark of ordinary (mean) high tide (both tidelands and submerged lands), and which may be included within the description of the lands claimed by complainants. Lacking any knowledge of the remaining allegations in Paragraph 28 of the Bill, defendants deny same on information and belief and demand strict proof thereof.

29. Defendants, lacking any knowledge of the allegations in Paragraph 29 of the Bill, deny same on information and belief and demand strict proof thereof.

30. Defendants admit the allegations of Subparagraphs A. and B. of Paragraph 30, but as to all remaining allegations of this paragraph, defendants, lacking any knowledge of said allegations, deny same on information and belief and demand strict proof thereof.

31. Defendants, lacking any knowledge of the allegations in Paragraph 31 of the Bill, deny same on information and belief and demand strict proof thereof.

32. Defendants, lacking any knowledge of the allegations in Paragraph 32 of the Bill, deny same on information and belief and demand strict proof thereof.

CLOUDS

33. Defendants admit the allegations of Sub-paragraphs A., B., C., and D. of Paragraph 33. Defendants deny the allegations of Sub-paragraph E. of said Paragraph and demand strict proof thereof.

34. Defendants deny that complainants have any valid title to or claim against the real property described in the Bill where such property is State-owned lands subject to the ebb and flow of the tide and is below the watermark of ordinary (mean) high tide (both tidelands and submerged lands). The State of Mississippi is the owner of all such lands, which are held in trust for the benefit of all of the people of the State, and these defendants are the owners of valid and subsisting oil, gas and mineral leases from the State Mineral Lease Commission on behalf of the State of Mississippi. These oil, gas and mineral leases and the lands described therein are set forth in detail in Sub-paragraphs A., B., C. and D. of Paragraph 33 of the Bill. Therefore, defendants deny the allegations of this Paragraph 34 insofar as it affects any such lands.

AFFIRMATIVE DEFENSE

Answering affirmatively, defendants aver that the lands described in the oil, gas and mineral leases referred to in Sub-paragraphs A., B., C., and D. of Paragraph 33 are tidelands and/or submerged lands which are subject to the ebb and flow of the tide up to the mean high watermark, and title to these lands has always been held in public trust

for the people of the State of Mississippi. Title to these lands has always been vested in the sovereign and remains vested today in the State of Mississippi in trust for the benefit of all of the people of the State, subject only to Federal control for commerce and navigation. Neither the Federal Government nor the State of Mississippi has ever been vested with authority to convey fee simple title to such lands to private owners. Therefore, the complainants never became vested with any title to said lands, and these lands are separate from the lands of complainants and do not constitute any cloud on the title to the lands of complainants.

And now having fully answered the Bill to Quiet and Confirm Title and to Cancel Clouds on Title, defendants pray that the Bill be dismissed as to those defendants at the cost of complainants.

Respectfully submitted,

SAGA PETROLEUM U.S. INC., MARSHALL R. YOUNG OIL CO., SAGAPART U.S. INC., PUBLIC SERVICE COMPANY OF OKLAHOMA, VARIBUS CORPORATION, ELLIOTT DAVIS, AS TRUSTEE OF THE ELLIOTT DAVIS MINERAL TRUST, BARRY M. DAVIS, AS TRUSTEE OF THE BARRY M. DAVIS REVOCABLE TRUST, and LEE H. DAVIS, AS TRUSTEE OF THE LEE H. DAVIS REVOCABLE TRUST.

[Names of counsel omitted]

[Certificate of Service omitted]

IN THE CHANCERY COURT OF
HANCOCK COUNTY, MISSISSIPPI

[Caption omitted]

ORDER GRANTING COMPLAINANTS AUTHORITY TO AMEND THE COMPLAINT

CAME on for hearing the complainants' Motion for Leave to Amend and the Court being fully advised in the premises and having carefully considered said Motion finds that it should be granted.

IT IS, THEREFORE, ORDERED that the Complaint is hereby amended to include paragraphs 7, 8, 11, 12, 13, 33 and 35K in the form set out below:

7. Saga Petroleum U.S. Inc., hereinafter sometimes referred to as Saga, is a foreign corporation which is doing business in the State of Mississippi and which is qualified to do business in the State of Mississippi. Its resident agent for service of process is C.T. Corporation System, 118 North Congress Street, Jackson, Mississippi, 39205.

8. Marshall R. Young Oil Co. is a foreign corporation which is doing business in the State of Mississippi and which is qualified to do business in the State of Mississippi. Its resident agent for service of process is C.T. Corporation System, 118 North Congress Street, Jackson, Mississippi, 39205.

11. Elliott Davis, individually, and as a co-partner doing business as Davis Bros. and as trustee of the Elliott Davis mineral trust. Elliott Davis is a non-resident of the State of Mississippi. He is a resident of the State of Oklahoma. His post office and street address is 4444 S. Zunis, Tulsa, Oklahoma.

12. Barry Davis, individually, and as a co-partner doing business as Dabro Enterprises and as trustee of the Barry M. Davis Revocable Trust. He is a non-resident of the State of Mississippi. His post office and street address is 2514 East 37th Street, Tulsa, Oklahoma.

13. A. Lee Davis, individually, and as a co-partner doing business as Dabro Enterprises and as trustee of the Lee H. Davis Revocable Trust. He is a non-resident of the State of Mississippi. His post office and street address is 2230 East 37th Street, Tulsa, Oklahoma.

B. Leon Davis, individually, and as a co-partner doing business as Davis Bros. and as trustee of the Leon Davis Mineral Trust. He is a non-resident of the State of Mississippi. His post office and street address is 500 McFarlin Building, Tulsa, Oklahoma, 74103.

C. Alex W. McCoy Associates, Inc. is a foreign corporation which is doing business in the State of Mississippi and which is qualified to do business in the State of Mississippi. Its resident agent for service of process is Martha W. Gerald, P.O. Box 158, 402 Lamar Life Building, Jackson, Mississippi, 39205.

D. Fred. Olsen Inc. is a foreign corporation which is doing business in the State of Mississippi and which is qualified to do business in the State of Mississippi. Its resident agent for service of process is C.T. Corporation System, 118 North Congress Street, Jackson, Mississippi, 39205.

33. The Mississippi Mineral Lease Commission, an agency of the State of Mississippi, acting for and on behalf of the State of Mississippi, on August 19, 1977, signed, sealed and delivered to Saga, four oil, gas and mineral leases in Township 8 South, Range 14 West of Hancock County, Mississippi, more particularly described as follows:

A. That lease recorded in Oil and Gas Book 32 page 575 of the land records on file in the Chancery Clerk's office in Hancock County, Mississippi, covering the following described acreage:

All State-owned lands subject to the ebb and flow of the tide and which are below the watermark of ordinary (mean) high tide (both tidelands and submerged lands) in the following claims and/or sections, or portiosn thereof, estimate dto comprise 568.15 acres:

TOWNSHIP 8 SOUTH, RANGE 14 WEST

568.15 acres

Tract 1: Sections 3, 4 and part of John J. Jourdan Claim 23 (said claim being also Section 23), which lies North of a line connecting the North line of Section 8 and the North line of Noel Jourdan Claim 28 (said claim being also Section 24).

B. That lease recorded in Oil and Gas Book 32 page 577 of the land records on file in the Chancery Clerk's office in Hancock County, Mississippi, covering the following described acreage:

All State-owned lands subject to the ebb and flow of the tide and which ~~are~~ below the watermark of ordinary (mean) high tide (both tidelands and submerged lands) in the following claims and/or sections, or portions therof, estimated to comprise 238.57 acres:

TOWNSHIP 8 SOUTH, RANGE 14 WEST

238.57 acres

Tract 2: Section 8, Noel Jourdan Claim 28 (said claim being also Section 24), that part of John J. Jourdan Claim 23 (said claim being also Section 23), which lies South of a

straight line connecting the North line of Section 8 with the North line of Noel Jourdan Claim 28 (said claim also being Section 24), and that part of John J. Jourdan Claim 3 (said claim being also Section 17), which lies North of a straight line connecting the South line of Section 187 and the South line of Noel Jourdan Claim 28 (said claim being also Section 24).

C. That lease recorded in Oil and Gas Book 32 page 579 of the land records on file in the Chancery Clerk's office in Hancock County, Mississippi, covering the following described acreage:

All State-owned lands subject to the ebb and flow of the tide and which are below the watermark of ordinary (mean) high tide, (both tidelands and submerged lands) in the following claims and/or sections, or portions thereof, estimated to comprise 575.73 acres:

TOWNSHIP 8 SOUTH, RANGE 14 WEST

575.73 acres

Tract 3: Sections 9, 10 and Noel Jourdan Claim 31.

D.(1) That lease recorded in Oil and Gas Book 32 page 585 of the land records on file in the Chancery Clerk's office in Hancock County, Mississippi, covering the following described acreage:

All State-owned lands subject to the ebb and flow of the tide and which are below the watermark of ordinary (mean) high tide (both tidelands and submerged lands) in the following claims and/or sections, or portions thereof, estimated to comprise 541.26 acres:

TOWNSHIP 8 SOUTH, RANGE 14 WEST

541.26 acres

Tract 6: That part of John J. Jourdan Claim 3 (said claim being also Section 17), which lies South of a straight line connecting the South line of Section 18 and the South line of Noel Jourdan Claim 28 (said claim being also Section 24), and that part of Joseph Favre Claim 31 (said claim being also Section 40), which lies East of Four Dollar Bayou.

D.(2) That lease recorded in Oil and Gas Book 30 page 500 of the land records on file in the Chancery Clerk's office in Hancock County, Mississippi, covering the following described acreage:

All wetlands owned by Lessor in the following Sections, estimated to comprise 886.5 acres:

TOWNSHIP 8 SOUTH, RANGE 15 WEST

No part of the real propety which is the subject of this suit is located in Township 8 South, Range 15 West; therefore, since the acreage described in Township 8 South, Range 15 West, is not at issue in this suit, the listing of that acreage is omitted.

TOWNSHIP 8 SOUTH, RANGE 14 WEST

Section 19:	250.00	acres
Section 40:	34.00	(West of Four Dollar Bayou)
Section 29:	60.00	(W 1/2)
Section 30:	182.50	
Section 31:	56.00	
Section 32:	27.50	

Saga assigned a 50% interest in the foregoing leases to Marshall R. Young Oil Co. on December 14, 1977. Said assignment is recorded in Oil and Gas Book 33 at page 192. According to an instrument of record in Hancock County Oil and Gas Book 36 page 279, it appears that, on or before January 10, 1978, Saga conveyed a portion of its interest in these leases to the defendants Public Service Company of Oklahoma; Varibus Corporation; Sagapart U.S. Inc.; Elliott Davis, individually, and as a co-partner doing business as Davis Bros. and as trustee of the Elliott Davis Mineral Trust; Barry Davis, individually,and as a co-partner doing business as Dabro Enterprises and as trustee of the Barry M. Revocable Trust; Lee Davis, individually, and as a co-partner doing business as Dabro Enterprises and as trustee of the Lee H. Davis Revocable Trust and Leon Davis, individually, and as a co-partner doing business as Davis Bros. and as trustee of the Leon Davis Mineral Trust.

Complainants further allege that, according to answers to interrogatories filed in this cause and other information, that the following transfers of interests have occurred which may affect the defendant lessee's interests in the state leases described above:

Alex W. McCoy Associates, Inc. (McCoy) and Leon Davis (Davis), among others, acquired a reversionary carried working interest in a development agreement of certain oil and gas properties in Hancock County, Mississippi (original agreement) dated December 19, 1974 at Deed Book AA-12, Page 516. Their interest in the leases set out above is defined in Article 5 of the original agreement. This agreement was amended on April 23, 1975, Deed Book AA-12, Page 598 (amended agreement).

On January 10, 1978, Oil and Gas Book 36, Page 279, and Oil and Gas Book 36, Page 346, a conveyance and sti-

pulation of interest was entered into between Saga Petroleum U.S. Inc. (Saga), Sagapart U.S. Inc. (Sagapart), Public Service Company of Oklahoma (Public Service) and Varibus Corporation (Varibus) in the respective interests of 32.5 percent, 7.5 percent, 30 percent and 30 percent. This conveyance and stipulation of interest was made subject to the amended agreement and subject to the reversionary carried working interests set forth therein. With respect to said reversionary carried working interest, Davis and McCoy also entered into said stipulation of interest.

On June 28, 1978, Oil and Gas Book 36, Page 461, Alex W. McCoy Associates, Inc. assigned its reversionary carried working interest under the amended agreement to Fred. Olsen Inc. (Olsen). This assignment conveyed all of McCoy's interest in an area including the property which is the subject of this lawsuit below depth of 16,000 feet to Olsen but reserved a one-fourth production payment until $10,000,000.00 plus interest and applicable taxes were received.

On June 28, 1978, Oil and Gas Book 37, Page 528, Alex W. McCoy Associates, Inc. assigned its reversionary carried working interest under the amended agreement discussed above to Fred. Olsen Inc. This assignment covered all of the reversionary carried working interest in the area above the depth of 16,000 feet to the surface and reserved a production payment of 10 percent of the reversionary carried working interest until recovery of $2,000,000.00 plus interest and taxes. Both of these assignments by McCoy to Olsen stipulated that the production payment was to be made from "undeveloped properties."

By unrecorded instrument dated September 10, 1975, Elliott Davis, Leon Davis, Barry Davis and Lee Davis conveyed their respective interests in the amended agreement

to Elliott Davis, Trustee of the Elliott Davis Mineral Trust dated March 1, 1968; Leon Davis, Trustee of the Leon Davis Mineral Trust dated March 1, 1968; Barry Davis; Trustee of the Barry M. Davis Revocable Trust dated September 1, 1975; and Lee Davis, Trustee of the Lee H. Davis Revocable Trust dated September 1, 1975. None of the trusts which were the grantees in this instrument are of record in Hancock County, Mississippi.

E. The grant of the foregoing leases with the general descriptions set out therein and the general estimates of acreage provided on the face of them constitute an assertion of a claim or pretention to the title of complainants to the subject real property as described in paragraphs 28 and 29 above and exhibit A hereto. Said leases cast doubt and suspicion on the title of the complainants who are in exclusive possession and control of the subject real property and who are the real owners. The granting of these leases, which are all filed of record in the land records of Hancock County, create serious and substantial clouds on the title of the complainants to the subject real property, as defined in exhibit A hereto, and in paragraphs 28 and 29 above.

35. K. That the State of Mississippi's claim and pretentions to mineral rights in the subject real property are void, and specifically, the oil, gas and mineral leases described in paragraph 33 as being those recorded in Oil and Gas Book 32 at page 575; Book 32 page 577; Book 32 page 579, Book 32 page 585, and Book 30 page 500 are void and of no effect to the extent that they purport to lease any of the subject real property.

SO ORDERED this the 26th day of February, 1980

/s/ John S. Morris
CHANCELLOR

IN THE CHANCERY COURT OF
HANCOCK COUNTY, MISSISSIPPI

[Caption omitted]

ANSWER OF DEFENDANT, FRED. OLSEN INC. TO BILL TO QUIET AND CONFIRM TITLE AND TO CANCEL CLOUDS ON TITLE AS AMENDED BY LEAVE OF THE COURT ON FEBRUARY 26, 1980

Comes now, Fred. Olsen Inc., defendant in the above styled and numbered cause and in answer to the Amended Bill to Quiet and Confirm Title and to Cancel Clouds on Title says:

1. That said defendant hereby adopts in full as its own and incorporates herein by reference the answer styled "ANSWER OF DEFENDANTS, SAGA PETROLEUM U.S. INC., ET AL TO BILL TO QUIET AND CONFIRM TITLE AND TO CANCEL CLOUDS ON TITLE" previously filed with the Court in the above styled and numbered cause and which answer remains on file as part of the record in this cause as it is now before the Court.

In further answer to said amendments to the Bill to Quiet and Confirm Title and to Cancel Clouds on Title s granted by leave of this Court on February 26, 1980, said defendant says:

2. Defendant admits the allegations of Paragraph No. 7 as so amended.

3. Defendant admits the allegations of Paragraph No. 8 as so amended.

4. Defendant admits the allegations of Paragraph No. 11 as so amended.

5. Defendant admits the allegations of Paragraph No. 12 as so amended.

6. Defendant admits the allegations of Paragraph No. 13 as so amended.

7. Defendant admits the allegations of Subparagraph A, B, C and D of Paragraph No. 33 as so amended. Defendant denies the allegations of Subparagraph E of Paragraph 33 as so amended.

8. Defendant denies the allegations of Paragraph No. 35 K as amended.

9. Defendant further denies that complainants are entitled to any of the relief prayed for as against said undersigned defendant in the original Bill and said Amendments thereto.

And now having fully answered the Bill to Quiet and Confirm Title and to Cancel Clouds on Title and the Amendments thereto, the defendant prays that said bill be dismissed as to the said undersigned defendant at the cost of complainants.

Respectfuly submitted,

FRED. OLSEN INC.

[Name of counsel omitted]

[Jurat omitted]

[Certificate of service committed]

IN THE CHANCERY COURT OF
HANCOCK COUNTY, MISSISSIPPI

[Caption omitted]

ANSWER OF DEFENDANTS, LEON DAVIS, INDIVIDUALLY AND AS CO-PARTNER D/B/A DAVIS BROS. AND AS TRUSTEE OF THE LEON DAVIS MINERAL TRUST TO BILL TO QUIET AND CONFIRM TITLE AND TO CANCEL CLOUDS ON TITLE AS AMENDED BY LEAVE OF THE COURT ON FEBRUARY 26, 1980

Comes now Leon Davis, individually and as a co-partner d/b/a Davis Bros. and as Trustee of the Leon Davis Mineral Trust, defendants in the above styled and numbered cause and in answer to the Amended Bill to Quiet and Confirm Title and To Cancel Clouds on Title say:

1. That said defendants hereby adopt in full as their own and incorporate herein by reference the answer styled "ANSWER OF DEFENDANTS, SAGA PETROLEUM U.S. INC., ET AL TO BILL TO QUIET AND CONFIRM TITLE AND TO CANCEL CLOUDS ON TITLE" previously filed with the Court in the above styled and numbered cause and which answer remains on file as part of the record in this cause as it is now before the Court.

In further answer to said amendments to the Bill to Quiet and Confirm Title and to Cancel Clouds on Title as granted by leave of this Court on February 26, 1980, said defendants say:

2. Defendants admit the allegations of Paragraph No. 7 as so amended.

3. Defendants admit the allegations of Paragraph No. 8 as so amended.

4. Defendants admit the allegations of Paragraph No. 11 as so amended.

5. Defendants admit the allegations of Paragraph No. 12 as so amended.

6. Defendants admit the allegations of Paragraph No. 13 as so amended.

7. Defendants admit the allegations of Subparagraph A, B, C and D of Paragraph No. 33 as so amended. Defendants deny the allegations of Subparagraph E of Paragraph 33 as so amended.

8. Defendants deny the allegations of Paragraph No. 35 K as amended.

9. Defendants further deny that complainants are entitled to any of the relief prayed for as against said undersigned defendants in the original Bill and said Amendments thereto.

And now having fully answered the Bill to Quiet and Confirm Title and to Cancel Clouds on Title and the Amendments therto, the defendants pray that said bill be dismissed as to the said undersigned defendants at the cost of complainants.

Respectfully submitted,

[Name omitted]

[Jurat omitted]

[Certificate of Service omitted]

IN THE CHANCERY OF
HANCOCK COUNTY, MISSISSIPPI

[Caption omitted]

ANSWER OF DEFENDANTS, ELLIOTT DAVIS, INDIVIDUALLY AND AS CO-PARTNER D/B/A DAVIS BROS. TO BILL TO QUIET AND CONFIRM TITLE AND TO CANCEL CLOUDS ON TITLE AS AMENDED BY LEAVE OF THE COURT ON FEBRUARY 26, 1980

Comes now Elliott Davis, individually and as a co-partner d/b/a Davis Bros., defendants in the above styled and numbered cause and in answer to the Amended Bill to Quiet and Confirm Title and to Cancel Clouds on Title say:

1. That said defendants hereby adopt in full as their own and incorporate herein by reference the answer styled "ANSWER OF DEFENDANTS, SAGA PETROLEUM U.S. INC., ET ALL TO BILL TO QUIET AND CONFIRM TITLE AND TO CANCEL CLOUDS ON TITLE" previously filed with the Court in the above styled and numbered cause and which answer remains on file as part of the record in this cause as it is now before the Court.

In further answer to said amendments to the Bill to Quiet and Confirm Title and to Cancel Clouds on Title as granted by leave of this Court on February 26, 1980, said defendants say:

2. Defendants admit the allegations of Paragraph No. 7 as so amended.

3. Defendant admit the allegations of Paragraph No. 8 as so amended.

4. Defendants admit the allegations of Paragraph No. 11 as so amended.

5. Defendants admit the allegations of Paragraph No. 12 as so amended.

6. Defendants admit the allegations of Paragraph No. 13 as so amended.

7. Defendants admit the allegations of Subparagraph A, B, C and D of Paragraph No. 33 as so amended. Defendants deny the allegations of Subparagraph E of Paragraph 33 as so amended.

8. Defendants deny the allegations of Paragraph No. 35 K as amended.

9. Defendants further deny that complainants are entitled to any of the relief prayed for as against said undersigned defendants in the original Bill and said Amendments thereto.

And now having fully answered the Bill to Quiet and Confirm Title and to Cancel Clouds on Title and the Amendments thereto, the defendants pray that said bill be dismissed as to the said undersigned defendants at the cost of complainants.

Respectfully submitted,

[Name omitted]

[Jurat omitted]

[Certificate of Service omitted]

IN THE CHANCERY COURT OF
HANCOCK COUNTY, MISSISSIPPI

[Caption omitted]

ANSWER OF DEFENDANTS, LEE DAVIS, INDIVIDUALLY AND AS A CO-PARTNER D/B/A DABRO ENTERPRISES TO BILL TO QUIET AND CONFIRM TITLE AND TO CANCEL CLOUDS ON TITLE AS AMENDED BY LEAVE OF THE COURT ON FEBRUARY 26, 1980

Comes now Lee Davis, individually and Lee H. Davis as a co-partner d/b/a Dabro Enterprises, defendants in the above styled and numbered cause and in answer to the Amended Bill to Quiet and Confirm Title and to Cancel Clouds on Title say:

1. That said defendants hereby adopt in full as their own and incorporate herein by reference the answer styled "ANSWER OF DEFENDANTS, SAGA PETROLEUM U.S. INC., ET AL TO BILL TO QUIET AND CONFIRM TITLE AND TO CANCEL CLOUDS ON TITLE" previously filed with the Court in the above styled and numbered cause and which answer remains on file as part of the record in this cause as it is now before the Court.

In further answer to said amendments to the Bill to Quiet and Confirm Title and to Cancel Clouds on Title as granted by leave of this Court on February 26, 1980, said defendants say:

2. Defendants admit the allegations of Paragraph No. 7 as so amended.

3. Defendants admit the allegations of Paragraph No. 8 as so amended.

4. Defendants admit the allegations of Paragraph No. 11 as so amended.

5. Defendants admit the allegations of Paragraph No. 12 as so amended.

6. Defendants admit the allegations of Paragraph No. 13 as so amended.

7. Defendants admit the allegations of Subparagraph A, B, C and D of Paragraph No. 33 as so amended. Defendants deny the allegations of Subparagraph E of Paragraph 33 as so amended.

8. Defendants deny the allegations of Paragraph No. 35 K as amended.

9. Defendants further deny that complainants are entitled to any of the relief prayed for as against said undersigned defendants in the original Bill and said Amendments thereto.

And now having fully answered the Bill to Quiet and Confirm Title and to Cancel Clouds on Title and the Amendments thereto, the defendants pray that said bill be dismissed as to the said undersigned defendants at the cost of complainants.

Respectfully submitted,

[Names omitted]

[Jurat omitted]

[Certificate of Service omitted]

ANSWER OF DEFENDANTS, BARRY DAVIS, INDIVIDUALLY AND AS A CO-PARTNER D/B/A DABRO ENTERPRISES TO BILL TO QUIET AND CONFIRM TITLE AND TO CANCEL CLOUDS ON TITLE AS AMENDED BY LEAVE OF THE COURT ON FEBRUARY 26, 1980

Comes now Barry Davis, individually and Barry M. Davis as a co-partner d/b/a Dabro Enterprises, defendants in the above styled and numbered cause and in answer to the Amended Bill to Quiet and Confirm Title and to Cancel Clouds on Title say:

1. That said defendants hereby adopt in full as their own and incorporate herein by reference the answer styled "ANSWER TO DEFENDANTS, SAGA PETROLEUM U.S. INC., ET AL TO BILL TO QUIET AND CONFIRM TITLE AND TO CANCEL CLOUDS ON TITLE" previously filed with the Court in the above styled and numbered cause and which answer remains on file as part of the record in this cause as it is now before the Court.

In further answer to said amendments to the Bill to Quiet and Confirm Title and to Cancel Clouds on Title as granted by leave of this Court on February 26, 1980, said defendants say:

2. Defendants admit the allegations of Paragraph No. 7 as so amended.

3. Defendants admit the allegations of Paragraph No. 8 as so amended.

4. Defendants admit the allegations of Paragraph No. 11 as so amended.

5. Defendants admit the allegations of Paragraph No. 12 as so amended.

6. Defendants admit the allegations of Paragraph No. 13 as so amended.

7. Defendants admit the allegations of Subparagraph A, B, C and D of Paragraph No. 33 as so amended. Defendants deny the allegations of Subparagraph E of Paragraph 33 as so amended.

8. Defendants deny the allegations of Paragraph No. 35 K as amended.

9. Defendants further deny that complainants are entitled to any of the relief prayed for as against said undersigned defendants in the original Bill and said Amendments therto.

And now having fully answered the Bill to Quiet and Confirm Title and to Cancel Clouds on Title and the Amendments thereto, the defendants pray that said bill be dismissed as to the said undersigned defendants at the cost of complainants.

Respectfully submitted,

[names omitted]

[Jurat omitted]

[Certificate of Service omitted]

IN THE CHANCERY COURT OF
HANCOCK COUNTY, MISSISSIPPI

[Caption omitted]

ANSWER OF DEFENDANTS, SAGA PETROLEUM U.S. INC. ET AL, TO BILL TO QUIET AND CONFIRM TITLE AND TO CANCEL CLOUDS ON TITLE AS AMENDED BY LEAVE OF THE COURT ON FEBRUARY 26, 1980

Come now Saga Petroleum U.S. Inc., Marshall R. Young Oil Co., Sagapart U.S. Inc., Public Service Company of Oklahoma, Varibus Corporation, Elliott Davis as Trustee of the Elliott Davis Mineral Trust, Barry M. Davis as Trustee of the Barry M. Davis Revocable Trust, and Lee H. Davis as Trustee of the Lee H. Davis Revocable Trust, defendants in the above styled and numbered cause and in answer to the Amended Bill to Quiet and Confirm Title and to Cancel Clouds on Title say:

1. That said defendants hereby reaffirm and repeat and incorporate herein by reference the answer styled "ANSWER OF DEFENDANTS, SAGA PETROLEUM U.S. INC., ET AL TO BILL TO QUIET AND CONFIRM TITLE AND TO CANCEL CLOUDS ON TITLE" previously filed with the Court in the above styled and numbered cause and which answer remains on file as part of the record in this cause as it is now before the Court.

In further answer to said amendments to the Bill to Quiet and Confirm Title and to Cancel Clouds on Title as granted by leave of this Court on February 26, 1980, said defendants say:

2. Defendants admit the allegations of Paragraph No. 7 as so amended.

3. Defendants admit the allegations of Paragraph No. 8 as so amended.

4. Defendants admit the allegations of Paragraph No. 11 as so amended.

5. Defendants admit the allegations of Paragraph No. 12 as so amended.

6. Defendants admit the allegations of Paragraph No. 13 as so amended.

7. Defendants admit the allegations of Subparagraph A, B, C and D of Paragraph No. 33 as so amended. Defendants dney the allegations of Subparagrfaph E of Paragraph 33 as so amended.

8. Defendants deny the allegations of Paragraph No. 35 K as amended.

9. Defendants further deny that complainants are entitled to any of the relief prayed for as against said undersigned defendants in the original Bill and said Amendments thereto.

And now having fully answered the Bill to Quiet and Confirm Title and to Cancel Clouds on Title and the Amendments thereto, the defendants pray that said bill be dismissed as to the said undersigned defendants at the cost of complainants.

Respectfully submitted,

Saga Petroleum U.S. Inc., Marshall R. Young Oil Co., Sagapart U.S. Inc., Public Service Company of Oklahoma, Varibus Corporation, Elliott Davis as Trustee of the Elliott Davis Mineral Trust, Barry M. Davis as Trustee of the Barry M. Davis Revocable Trust and Lee H. Davis as Trustee of the Lee H. Davis Revocable Turst.

[Name of counsel omitted]

[Jurat omitted]

[Certificate of Service omitted]

FILED
APR 14 1980

IN THE CHANCERY COURT OF
HANCOCK COUNTY, MISSISSIPPI

[Caption omitted]

SEPARATE ANSWER OF PHILLIPS PETROLEUM COMPANY TO BILL TO QUIET AND CONFIRM TITLE AND TO CANCEL CLOUDS ON TITLE AS AMENDED BY LEAVE OF THE COURT ON FEBRUARY 16, 1980

AND NOW comes Phillips Petroleum Company, one of the Defendants, and in answer to the Amended Bill, answering says:

I.

The Defendant answering here hereby adopts in full and incorporates herein by reference its Appearance and Separate Answer previously filed in this cause.

In further answer to the Amendments authorized by the Court on February 26, 1980, this Defendant answering, says:

I.

It admits the allegations of Paragraph No. 7, as amended.

II.

It admits the allegations of Paragraph No. 8, as amended.

III.

It admits the allegations of Pargraph No. 11, as amended.

IV.

It admits the allegations of Paragraph No. 12, as amended.

V.

It admits the allegations of Paragraph No. 13, as amended.

VI.

It admits the allegations of Paragraph No. 33, as amended.

VII.

This Defendant cannot deny the allegations of Paragraph No. 35 K, as amended.

AND NOW, having fully answered Amendments to the Bill of Complaint, this Defendant prays that the Court adjudicate that it has a 50% leasehold interest in the oil, gas and minerals leased by Union as described in sub-paragraph 29-E of the Bill, and that the Court adjudicate that such estate is established by Assignment of a 1/2 interest in the Union lease referred to, which Assignment is recorded in Book 32, at page 106, of the Land Records on file in the Chancery Clerk's office in Hancock County, Mississippi; and, this Defendant prays for general relief.

PHILLIPS PETROLEUM COMPANY, Defendant

[Names of counsel omitted]

[Jurat omitted]

[Certificate of Service omitted]

FILED
MAY 9, 1980

IN THE CHANCERY COURT OF
HANCOK COUNTY, MISSISSIPPI

[Caption omitted]

**CROSS-BILL OF DEFENDANT
STATE OF MISSISSIPPI**

COMES NOW the Cross-Complainant, State of Mississippi, by and through its representative Bill Allain, Attorney General of the State of Mississippi, and files herewith this its Cross-Bill against the Cinque Bambini Partnership, one of the Complainants in this litigation, now being made a Cross-Defendant, and would show unto the Court the following:

1. The Cross-Defendants, Cinque Bambini Partnership, is a partnership composed of Evelyn Crump Johnson, Helen Crump Cutler, Joseph P. Crump, Armand B. Crump, and Donald E. Crump, who, according to the Bill of Complaint, paragraph 31(d) were the sole devisees of James L. Crump, who died testate on April 25, 1963, and the aforementioned Cross-Defendants were vested with title to the property owned by James L. Crump and were the beneficiaries of the distribution of the assets of the Estate of James L. Crump, which Estate was administered by J.D. Crump, K.C. Barranger and E.C. Shanks, testamentary co-executors of the Estate of James L. Crump. Cross-Complainant would show further unto the Court that the Cross-Defendant, Cinque Bambini Partnership, composed of the individuals heretofore named, is made a Cross-Defendant in these proceedigns because the members of said partnership were the recipients and beneficiaries of certain sales of property belonging to the Cross-Complainant as will be hereinafter shown.

2. Cross-Complainant would show further that on September 18, 1967 the estate of James L. Crump, represented by J.D. Crump, K.C. Barranger and E.C. Shanks, testamentary co-executors of the Estate of James L. Crump, hereinafter called Crump Estate, entered into a Special Borrow Pit Lease Contract and Agreement, a copy of which is attached hereto, with T.L. James and Company, Incorporated, a Louisiana Corporation domiciled in Ruston, Lincoln Parish, Louisiana;

3. Cross-Complainant would show further that the real property which was the subject of the aforesaid Special Borrow Pit Lease Contract and Agreement is Bayou Enceinte, Hancock County, Mississippi and its adjacent land area, all of which is a portion of the property the subject of the present litigation;

4. Cross-Complainant would show further that the aforesaid Special Borrow Pit Lease Contract and Agreement dated September 18, 1967 provided for the leasing of Bayou Enceinte and its adjacent land area by the Crump Estate for the exploration, mining and removal of special borrow or any dirt suitable for embankment or roadway material for use by the T.L. James and Company, Incorporated, its affiliates, partners, or associates in the construction of U.S. Interstate Highway 10 in Hancock County, Mississippi;

5. Cross-Complainant would show further that one million, six hundred and fifty-six thousand, and thirty-seven (1,656,037) cubic yards of dirt, more or less, were removed under the aforesaid Special Borrow Pit Lease Contract and Agreement from Bayou Enceinte and its adjacent land area and that the T.L. James and Company, Incorporated, based on information and belief, paid Twenty-Seven Thousand, Six Hudnred and Five and

82/100 Dollars ($27,605.82), more or less, into the Estate of James L. Crump for the dirt and special borrow that was removed pursuant to the lease agreement between September 18, 1967 and September 18, 1970;

6. Cross-Complainant would show further that the T.L. James and Company, Incorporated was paid ninety-eight cents (98¢) per cubic yard, more or less, by the State Highway Commission of Mississippi for dirt in place for the construction or part of Interstate 10 in Hancock County, Mississippi near the Jourdan River;

7. Cross-Complainant would show further that one million, six hundred fifty-six thousand, and thirty-seven (1,656,037) cubic yards of dirt, more or less, was provided by the Crump Estate to the T.L. James and Company, Incorporated pursuant to the aforesaid Special Borrow Pit Lease Contract and Agreement and that the dirt provided to T.L. James by the Crump Estate was then provided in place by the T.L. James and Company, Incorporated to the State Highway Commission of Mississippi, an agency of the Cross-Complainant, State of Mississippi;

8. Cross-Complainant would show further that title to submerged land below mean high tide is in the State of Mississppi and such property is public trust property held in trust by the State;

9. Cross-Complainant would show further that the submerged land in Bayou Enceinte below mean high tide was the property of the State of Mississippi held in trust by the State and the title of such property below mean high tide remains in the State; and that as a result of the action of the Cross-Defendants' testators estate, the Cross-Defendants have been unjustly enriched in that the State of Mississippi has been caused to be paid into the Crump

Estate for the benefit of the Cross-Defendants monies for property that in fact belonged to and was the property of the State of Mississippi;

10. Cross-Complainant would show further that pursuant to the aforementioned Special Borrow Pit and Lease Contract and Agreement the Crump Estate sold public trust land below mean high tide in Bayou Enceinte to T.L. James and Company, Incorporated, said public trust lands sold totaling, based in information and belief, five hundred forty-four thousand, and thirty-six (544,036) cubic yards, more or less, at a cost to the State of ninety-eight cents (98¢) per cubic yard for a total amount of Five Hundred Thirty-Three Thousand, One Hundred Fifty-Five and 68/100 Dollars ($533,155.68), more or less, said sum representing a loss to the State of Mississippi in said amount and a resulting unjust enrichment to the Cross-Defendants by virtue of the illegal acts in selling the property belonging to the State of Mississippi and the accepting of the benefits thereform;

11. Cross-Complainant would show further that the Cross-Defendants have been unjustly enriched in that after illegally removing the land which was excavated below mean high tide there has been created two large bodies of water located in borrow pits which resulted from the illegal excavation of the property of the State of Mississippi and that such illegal excavation has enhanced the value of the Cross-Defendnats' property and that the Cross-Defendants now seek to convert the borrow pits and adjacent property into real property to be offered for sale to the public which would include controlled access to properties, and that the illegally created borrow pits and bodies of water resting thereon now completely hide under many feet of water the properties owned by the Cross-

Complainant, State of Mississippi, and that the Cross-Defendants, as a result of the illegal actions as aforesaid done on their behalf and from which they obtained benefit in the past and now seek additional benefits through potential sales, have been unjustly enriched by the enhanced value of their property and are indebted to the State of Mississippi as a result of their unjust enrichment at the expense of the State of Mississippi in the sum of One Million, Five Hundred Thousand Dollars ($1,500.000.00).

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Cross-plainant, State of Mississippi, prays that its original Answer filed in this cause stands as pled and that its Cross-Bill be considered and that all said averments or denials contained in the Cross-Complainant's original Answer be and they are hereby adopted in this Cross-Complaint and that on a final hearing by this Court, the Court shall order, adjudge and decree and confirm that:

1. The Cross-Complainant, State of Mississippi, held, as public trust property at the time of the execution of and performance under the Special Borrow Pit Lease Contract and Agreement signed on September 18, 1967, title to the submerged land of Bayou Enceinte up to mean high tide;

2. The Cross-Complainant, State of Mississippi, has suffered a loss, due to the Special Borrow Pit Lease Contract and Agreement by the Crump Estate of the submerged land of Bayou Enceinte up to mean high tide, in the amount of Five Hundred Thirty-Three Thousand, One Hundred Fifty-Five and 68/100 Dollars ($533,156.68), more or less, due to the sale of approximately five hundred forty-four thousand, and thirty-six (544,036) cubic yards

of dirt, more or less, to the T.L. James and Company, Incorporated:

3. The Cross-Defendants have been unjustly enriched by the creation of the bodies of water in the borrow pits created by the illegal taking of the Cross-Complainant's land and the Cross-Complainant, State of Mississippi, is entitled to judgment against Cross-Defendants for such unjust enrichment in the sum of One-Million, Five Hundred Thousand Dollars ($1,500,000.00);

4. The Cross-Complainant, State of Mississippi, prays that judgment in the amount of Two Million, Thirty-Three Thousand, One Hundred Fifty-Five and 68/100 Dollars ($2,033,155.68) be awarded against the Cross-Defendants;

5. The costs of this action shall be assessed against Cross-Defendants.

Should Cross-Complainant, State of Mississippi, be mistaken in the relief requested, then Cross-Complainant, State of Mississippi, prays for such other relief, both general and special, as is appropriate in the premises and as the Court may deem just and proper.

Dated this the 2nd day of April, 1981.

Respectfully submitted,

BILL ALLAIN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

[Names of other counsel omitted]

FILED
APR 2 1981

STATE OF LOUISIANA SPECIAL BORROW PIT
PARISH OF ORLEANS LEASE AGREEMNT

KNOW ALL MEN BY THESE PRESENTS, that on this 18th day of September, 1967, came and appeared the Estate of JAMES L. CRUMP, herein represented by J.D. CRUMP, K.C. BARRANGER and E.C. SHANKS, Testamentary Co-Executors of the Estate of James L. Crump, hereinafter called LESSOR, and T.L. JAMES & CO., INC., a Louisiana corporation domiciled in Ruston, Lincoln Parish, Louisiana and represented herein by its duly authorized Vice President, George D. Williams, hereinafter called LESSEE, who declared that they do enter into the following Special Borrow Pit Lease contract and Agreement:

1. DESCRIPTION

LESSOR agrees to lease to LESSEE that certain portion of real property located in the State of Mississippi, County of Hancock which is more particularly set out and described on the plat attached hereto and made a part hereof and initialed by the LESSOR and the LESSEE for identification herewith.

2. PURPOSE

It is agreed that this lease is for the purpose of permitting LESSEE to explore for, mine and remove special borrow or any dirt suitable for embankment or roadway material for use by LESSEE, its affiliates, partners, or associates in a joint venture, in the construction of U.S. Interstate Highway 10 and taht the rights granted LESSEE are not assignable, except to such affiliates, partners, or associates in a joint venture with respect to construction of Interstate Highway 10.

3. CONSIDERATION

Consideration for this lease shall be TWENTY-FIVE THOUSAND AND NO/100 ($25,000.00) DOLLARS for all material removed up to and including One Million Five Hundred Thousand (1,500,000) cu. yds. and 1-2/3¢ for each cu. yd. over 1,500,000 cu. yds. removed from the leased presmises. The measurement to be used for all purposes of payment herein shall be that quantity of suitable embankment material which is determined for the purpose of paying LESSEE in accordance with its contract or contracts for the construction of Interstate Highway 10 upon which said material shall be exclusively used.

4. PAYMENT

FIFTEEN THOUSAND AND NO/100 ($15,000.00) DOLLARS shall be paid to LKESSOR by LESSEE simultaneously with the execution of this Agreement. After LESSEE has removed 750,000 cu. yds. it shall remit to LESSOR 1-1/3¢ for each cu. yd. of the next 750,000 cu. yds. removed which said sums shall be due thirty (30) days after LESSOR is paid for the placement of the said material upon Interstate Highway 10 until such time as 1,500,000 cu. yds. have been removed by LESSEE. Should the said contract terminate or should LESSEE cease for any reason to use the leased premises before removing 1,500,000 cu. yds. of material, it shall pay within sixty (60) days after said cessation of use the difference between the sums theretofore remitted and TWENTY-FIVE THOUSAND AND NO/100 ($25,000,00) DOLLARS. After removal of 1,500,000 cu. yds. of material the LESSEE shall pay to the LESSOR 1-2/3¢ for each cu. yd. of material removed which said sum shall be paid to LESSOR by LESSEE thirty (30) days after LESSEE is paid for placing the said material under its contract for the construction of Interstate Highway I-10.

5. TERM

The term of this lease shall be for a period not longer than three (3) years from the date of the execution of the lease agreement. LESSEE shall execute a cancellation of this lease agreement at such time as it or any of its affiliates have no need for any suitable embankment material for the construction of Interstate Highway I-10 within the vicinity of the leased premises if such cancellation is required by LESSOR prior to the end of the three year term.

6. SPECIFICATIONS

Retaining dykes around spoil areas 1, 2, 3 and 4 as indicated on the attached plat will be erected by LESSEE to the maximum height permitted by ground conditions and the condition of the material used to construct the said dykes. LESSEE shall strip material from borrow pits 1 and 2, as indicated on the attached plat, which is unsuitable for highway embankment and will place the said stripped material in spoil areas 1, 2,. 3 and 4 to the maximum height that he said stripped material and the conditions of the ground will permit. There shall be no consideration due by LESSEE to LESSOR in connection with the said stripping operations. LESSEE shall remove from borrow pits 1 and 2 a minimum of 750,000 cu. yds of embankment material suitable for use in connection with the above described contract. LESSEE shall not remove more than 2,500,000 cu. yds. of suitable embankment material.

7. WARRANTY OF TITLE AND OWNERSHIP

LESSOR hereby warrants and agrees to defend the title of said lands and further warrants that he is the sole and only owner of the property described herein above. LESSOR agrees to indemnify LESSEE from any and all claims by third parties based on the rights of ownership. In case

of any title dispute or litigation, LESSEE is hereby authorized to withhold payment of royalties until final adjudication or settlement of said disputes.

8. RIGHT OF INGRESS AND EGRESS

LESSEEE shall have the full right of ingress and egress to and from said property and the right to construct and maintain roads, bridges, culverts, plants, equipment and other structures necessary and convenient to LESSEE's operation under the terms of this lease and shall specifically have the right to lay pipelines necessary in connection with the transportation and dredging of material over the entire property owned by LESSOR in the viciity of the leased premises.

9. REMOVAL OF TREES AND OTHER IMPROVEMENTS

LESSEE is granted the right to remove any trees, shrubs or other structures and improvements presently on the leased premises which impede or are not needed in its operation on said premises.

10. REMOVAL OF EQUIPMENT AND MATERIAL

Upon termination of this lease, LESSEE shall have the right to remove all equipment and buildings not previously removed from the premises, within a period of thirty (30) days from the date of termination. LESSEE shall restore the leased premises to the same condition that it was in when it took possession of the leased premises under the terms of this lease except where deliberate alterations were made such as in spoil areas and borrow pits or where shrubbery or trees were removed in connection with the operations conducted on the leased premises under the terms of this lease.

11. INDEMNIFICATION

LESSEE agrees to indemnify and hold LESSOR harmless from any and all claims or damages resulting from its operations on the leased premises except insofar as claims resulting from title to the leased premises which said claims are specifically provided for hereinabove.

THUS DONE AND SIGNED in the presence of the undersigned competent witnesses.

[Names of witnessses omitted] [Names of lessors and lessees omitted]

[Attached map omitted]

[Certificate of Service omitted]

ANSWER OF PHILLIPS PETROLEUM COMPANY TO ALL AFFIRMATIVE MATTERS CONTAINED IN THE ANSWERS OF THE STATE OF MISSISSIPPI, AND SAGA PETROLEUM U.S., INC., ET AL TO THE BILL OF COMPLAINT AS AMENDED

Comes now Phillips Petroleum Company ("Phillips") and respectfuly answers nad responds to all affirmative matters contained in the Answers of the State of Mississippi, and Saga Petroleum U.S., Inc., et al, to the Bill of Complaint as amended.

1. Phillips denies either the State of Mississippi or any oil, gas and mineral lessee of the State, including Saga, owns any interest in any portion of the lands described in the Bill of Complaint as amended, under the public trust doctrine or otherwise.

2. The State of Mississippi and all pesons claiming under the State of Mississippi, including Saga, are estopped to deny the validity of the title as deraigned and claimed in the Bill of Complaint, as amended.

3. The oil, gas and mineral leases executed by the State of Mississippi in favor of Saga in question in this proceeding and set out with particularity in the Bill of Complaint as amended are void.

[Names of counsel for Phillips Petroleum Company omitted]

FILED
June 2, 1981

IN THE CHANCERY COURT OF
HANCOCK COUNTY, MISSISSIPPI

[Caption omitted]

COMPLAINANTS' ANSWER TO AFFIRMATIVE MATTER SET OUT IN THE ANSWER OF DEFENDANT, STATE OF MISSISSIPPI

COME NOW the Complainants and respond to the affirmative matter contained in the answer of the Defendant, The State of Mississippi, as follows: The affirmative matter set out in the answer of the State of Mississippi, at pages 4 and 5, or otherwise, is hereby denied.

Dated this the 15th day of June, 1981.

Respectfully submitted,

[Names of counsel omitted]

FILED
JUN 17 1981

IN THE CHANCERY COURT OF
HANCOCK COUNTY, MISSISSIPPI

[Caption omitted]

COMPLAINANTS' ANSWER TO AFFIRMATIVE MATTER CONTAINED IN THE ANSWER OF SAGA PETROLEUM U.S., INC., ET AL

COME NOW the Complainants and respond to the affirmative matter contained in the answer of the Defendant, Saga Petroleum U.S., Inc., et al, as follows: The affirmative matter set out in the answer of Saga Petroleum U.S., Inc. at page 5, or otherwise, is hereby denied.

Dated this the 15th day of June, 1981.

Respectfully submitted,

[Names of counsel omitted]

FILED
JUN 17 1981

BEST AVAILABLE COPY

C-36

Producers 88 (Paid) (Revised Oct. 1, 1948) With Pooling Provision.

OIL, GAS AND MINERAL LEASE

BOOK 32 PAGE 385

THIS AGREEMENT made this 19th day of August 77 between STATE MINERAL LEASE COMMISSION, for and on behalf of the STATE OF MISSISSIPPI

Lessor (whether one or more) whose address is P. O. Box 220, Jackson, Mississippi 39205
and SAGA PETROLEUM U.S. INC., 2000 West Loop South, Houston, Texas 77027 Lessee, WITNESSETH:

1. Lessor in consideration of --Two Hundred Eighteen Thousand One Hundred Sixteen and 96/100-- Dollars
($ 218,116.96), in hand paid, of the royalties herein provided, and of the covenants of Lessee herein contained, hereby grants, leases and lets exclusively unto Lessee for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals, laying pipe lines, building roads, tanks, power stations, telephone lines and other structures thereon, to produce, save, take care of, treat, transport and own said products, and housing its employees, the following described land in Hancock County, Mississippi, to-wit:

All State-owned lands subject to the ebb and flow of the tide and which are below the watermark of ordinary (mean) high tide (both tidelands and submerged lands) in the following claims and/or sections, or portions thereof, estimated to comprise 541.26 acres:

TOWNSHIP 8 SOUTH, RANGE 14 WEST

Tract 6: That part of John J. Jourdan Claim 3 (said claim being also Section 17), which lies South of a straight line connecting the South line of Section 18 and the South line of Noel Jourdan Claim 28 (said claim being also Section 24), and that part of Joseph Favre Claim 31 (said claim being also Section 40), which lies East of Four Dollar Bayou. 541.26 acres

It is understood that this lease will cover only oil and gas and all constituent products produced therewith (both hydrocarbon and non-hydrocarbon), and sulphur and that the words "all other minerals" are deleted wherever they appear in this lease form. Paragraph 3 of this lease is hereby amended to read one-fourth (1/4th) royalty on oil and gas and all constituent products produced therewith (both hydrocarbon and non-hydrocarbon); further the royalty for sulphur shall be $2.00 per long ton.

This lease also covers and includes all land owned or claimed by Lessor adjacent or contiguous to the land particularly described above, whether the same be in said section or sections, grant or grants, or in adjacent sections or grants, although not included within the boundaries of the land particularly described above. For the purpose of calculating the rental payments hereinafter provided for, said land is estimated to comprise 541.26 acres, whether it actually comprises more or less.

2. Subject to the other provisions herein contained, this lease shall be for a term of three (3) years from this date (called "primary term") and as long thereafter as oil, gas or other mineral is produced from said land or lands with which said land is pooled hereunder.

3. The royalties to be paid by Lessee are: (a) on oil, one-eighth of that produced and saved from said land, the same to be delivered at the wells or to the credit of Lessor into the pipe line to which the wells may be connected; Lessor may from time to time purchase any royalty oil in its possession, paying the market price therefor prevailing for the field where produced on the date of purchase, or other case such interest to bear its proportion of any expense of treating unmerchantable oil to render it merchantable as crude; (b) on gas, including casinghead gas or other gaseous substance, produced from said land and used or used off the premises or in the manufacture of gasoline or other product therefrom, the market value at the well of one-eighth of the gas so sold or used, provided that on gas sold at the wells the royalty shall be one-eighth of the amounts realized from such sale; where gas from a gas well is not sold or used, Lessee may pay as royalty $100.00 per well per year and if such payment is made it will be considered that gas is being produced within the meaning of Paragraph 2 hereof; and (c) on all other minerals mined and marketed, one-tenth either in kind or value at the well or mine, at Lessor's election, except that on sulphur mined and marketed, the royalty shall be fifty cents ($0.50) per long ton. Lessee shall have free use of oil, gas, coal, wood and water from said land, except water from Lessor's wells, for all operations hereunder, and the royalty on oil, gas and coal shall be computed after deducting any so used. Lessor shall have the privilege at his risk and expense of using gas from any gas well on said land for stoves and inside lights in the principal dwelling thereon out of any surplus gas not needed for operations hereunder.

4. Lessee, at its option, is hereby given the right and power to pool or combine the acreage covered by this lease or any portion thereof with other land, lease or leases in the immediate vicinity thereof, when in Lessee's judgment it is necessary or advisable to do so in order properly to develop and operate said premises in compliance with any lawful spacing rule which may be prescribed for the field in which this lease is situated by any duly authorized authority, or when to do so would, in the judgment of Lessee, promote the conservation of the oil and gas in and under and that may be produced from said premises. Lessee shall execute in writing an instrument identifying and describing the pooled acreage. The entire acreage so pooled into a tract or unit shall be treated, for all purposes except the payment of royalties on production from the pooled unit, as if it were included in this lease. If production is found on the pooled acreage, it shall be treated as if production is had from this lease, whether the well or wells be located on the premises covered by this lease or not. In lieu of the royalties elsewhere herein specified, Lessor shall receive on production from a unit so pooled only such portion of the royalty stipulated herein as the amount of his acreage placed in the unit or his royalty interest therein on an acreage basis bears to the total acreage so pooled in the particular unit involved.

5. If operations for drilling are not commenced on said land or on acreage pooled therewith as above provided on or before one year from this date the lease shall then terminate as to both parties, unless on or before such anniversary date Lessee shall pay or tender to Lessor or to the credit of Lessor in State Mineral Lease Commission, Attorney General, P. O. Box 220, Jackson Mississippi 3920
(which bank and its successors are Lessor's agents and shall continue as the depositary for all rentals payable hereunder regardless of changes in ownership of said land or the rentals) the sum of Five Hundred Forty-One and 26/100 Dollars
($ 541.26), (herein called rental), which shall cover the privilege of deferring commencement of drilling operations for a period of twelve (12) months. In like manner and upon like payments or tenders annually the commencement of drilling operations may be further deferred for successive periods of twelve (12) months each during the primary term. The payment or tender of rental may be made by the check or draft of Lessee mailed or delivered to Lessor or to said bank on or before such date of payment. If such bank (or any successor bank) should fail, liquidate or be succeeded by another bank, or for any reason fail or refuse to accept rental, Lessee shall not be held in default for failure to make such payment or tender of rental until thirty (30) days after Lessor shall deliver to Lessee a proper recordable instrument, naming another bank as agent to receive such payments or tenders. The down cash payment is consideration for this lease according to its terms and shall not be allocated as more rental for a period. Lessee may at any time or times execute and deliver to Lessor or to the depositary above named or place of record a release or releases covering any portion or portions of the above described premises and thereby surrender this lease as to such portion or portions and be relieved of all obligations as to the acreage surrendered, and thereafter the rentals payable hereunder shall be reduced in the proportion that the acreage covered hereby is reduced by said release or releases.

6. If prior to discovery of oil, gas or other mineral on said land or on acreage pooled therewith, or if after discovery of oil, gas or other mineral, the production thereof should cease from any cause, this lease shall not terminate if Lessee commences additional drilling or reworking operations within 60 days thereafter or if it be within the primary term, commences or resumes the payment or tender of rentals or commences operations for drilling or reworking on or before the rental paying date next ensuing after the expiration of 60 days from date of completion of dry hole or cessation of production. If at any time subsequent to sixty (60) days prior to the beginning of the last year of the primary term and prior to the discovery of oil, gas or other mineral on said land, or on acreage pooled therewith, Lessee should drill a dry hole thereon, no rental payment or operations are necessary in order to keep the lease in force during the remainder of the primary term. If at the expiration of the primary term, oil, gas or other minerals is not being produced on said land, or on acreage pooled therewith, but Lessee is then engaged in drilling or reworking operations thereon or shall have completed a dry hole thereon within sixty (60) days prior to the end of the primary term, the lease shall remain in force so long as operations are prosecuted with no cessation of more than sixty (60) consecutive days, and if they result in the production of oil, gas or other minerals, so long thereafter as oil, gas or other minerals is produced from said land or acreage pooled therewith. In the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and within one hundred fifty (150) feet of and draining the leased premises, or acreage pooled therewith, Lessee agrees to drill such offset wells as a reasonably prudent operator would drill under the same or similar circumstances.

7. Lessee shall have the right at any time during or after the expiration of this lease to remove all property and fixtures placed by Lessee on said land, including the right to draw and remove all casing. Where required by Lessor, Lessee will bury all pipe lines below ordinary plow depth, and no well shall be drilled within two hundred (200) feet of any residence or barn now on said land without Lessor's consent. Lessee shall be responsible for all damages caused by Lessee's operations hereunder, other than damages reasonably caused by the exercise of the rights herein granted.

8. The rights of either party hereunder may be assigned in whole or in part, and the provisions hereof shall extend to their heirs, successors and assigns; but no change or division in ownership of the land, rentals or royalties, however accomplished, shall operate to enlarge the obligations or diminish the rights of Lessee; and no change or division in such ownership shall be binding on Lessee until thirty (30) days after Lessee shall have been furnished by registered U. S. mail at Lessee's principal place of business with a certified copy of recorded instrument or instruments evidencing same. In the event of assignment hereof in whole or in part liability for breach of any obligation hereunder shall rest exclusively upon the owner of this lease or of a portion thereof who commits such breach. In the event of the death of any person entitled to rentals hereunder, Lessee may pay or tender such rentals to the credit of the deceased or the estate of the deceased until such time as Lessee is furnished with proper evidence of the appointment and qualifications of an executor or administrator of the estate, or if there be none, then until Lessee, in furnished with evidence satisfactory to it as to the heirs or devisees of the deceased, and that all debts of the estate have been paid. If at any time two or more persons be entitled to participate in the rental payable hereunder, Lessee may pay or tender said rental jointly to such persons or to their joint credit in the depositary named herein, or, at Lessee's election, the proportionate part of said rental to which each participant is entitled may be paid or tendered to him separately or to his separate credit in said depository, and payment or tender to any participant of his portion of the rentals hereunder shall maintain this lease as to such participant. In event of assignment of this lease as to a segregated portion of said land, the rentals payable hereunder shall be apportionable as between the several leasehold owners ratably according to the surface area of each, and default in rental payment by one shall not affect the rights of other leasehold owners hereunder. If two or more parties become entitled to royalty hereunder, Lessee may withhold payment thereof unless and until furnished with a recordable instrument executed by all such parties designating an agent to receive payment for all.

EXHIBIT C-36
EVIDENCE

BEST AVAILABLE COPY

9. The breach by Lessee of any obligation hereunder shall not work a forfeiture or termination of this lease nor be cause for cancellation hereof in whole or in part, save as herein otherwise provided. If the obligation should require the drilling of a well or wells, Lessee shall have ninety (90) days after the receipt of written notice by Lessor from Lessor specifically stating the breach alleged by Lessee within which to begin operations for the drilling of any such well or wells; and the only penalty for failure so to do shall be the termination of this lease save as to forty (40) acres for each well being worked on or producing oil or gas, to be selected by Lessee so that each forty (40) acre tract will embrace one such well. After the discovery of oil, gas or other mineral in paying quantities on said premises, Lessee shall reasonably develop the acreage retained hereunder, but in discharging this obligation it shall in no event be required to drill more than one well per forty (40) acres of the area retained hereunder and capable of producing oil, gas or other mineral in paying quantities.

10. Lessee hereby covenants and agrees to defend the title to said land and agrees that Lessor shall have the right to purchase any lien [illegible] in accord that if Lessor owns an interest in said land less than the entire fee simple estate, then the royalties and rentals to be paid Lessor shall be reduced proportionately. Failure of Lessee to reduce rental paid hereunder shall not impair the right of Lessee to reduce royalties.

11. Should Lessee be prevented from complying with any express or implied covenant of this lease, from conducting drilling or reworking operations thereon or from producing oil or gas therefrom by reason of scarcity of or inability to obtain or to use equipment or material, or by operation of force majeure, or any Federal or state law or any order, rule or regulation of governmental authority, then while so prevented, Lessee's obligation to comply with such covenant shall be suspended, and Lessee shall not be liable in damages for failure to comply therewith; and this lease shall be extended while and so long as Lessee is prevented by any such cause from conducting drilling or reworking operations on or from producing oil or gas from the leased premises; and the time while Lessee is so prevented shall not be counted against Lessee, anything in this lease to the contrary notwithstanding.

12. The undersigned Lessor, for himself and his heirs, successors and assigns, hereby surrenders and releases all rights of homestead in the premises hereby described, in so far as said rights of homestead may in any way affect the purposes for which this lease is made as recited herein, and agrees that the annual drilling deferment rental payments made to Lessor as herein provided will fully protect this lease as to the full interests of the undersigned.

In WITNESS WHEREOF, this instrument is signed, sealed and delivered on the date first above written.

WITNESS:

STATE MINERAL LEASE COMMISSION (SEAL)

BY Cliff Finch (SEAL)

CLIFF FINCH, Governor and Ex Officio Chairman (SEAL)

(SEAL)

(SEAL)

BY A. F. Summer (SEAL)

A. F. SUMMER, Attorney General and Ex Officio Secretary

STATE OF MISSISSIPPI
COUNTY OF HINDS

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, and while within my official jurisdiction, the within named CLIFF FINCH and A. F. SUMMER, personally known to me to be the Governor of the State of Mississippi and Ex Officio Chairman of the State Mineral Lease Commission, and the Attorney General of the State of Mississippi and Ex Officio Secretary of the State Mineral Lease Commission, respectively, who acknowledged before me that they signed, sealed and delivered the foregoing Oil, Gas and Mineral Lease as the act and deed of said Commission for and on behalf of the State of Mississippi, on the date and for the purposes therein stated, first being duly authorized so to do.

GIVEN under my hand and official seal of office, this the 26th day of August, 1977.

Mrs. J. J. Langford
NOTARY PUBLIC

My Commission Expires:

My Commission Expires Sept. 15, 1978

(Affix Seal)

My commission expires:

Notary Public.

STATE OF MISSISSIPPI,
COUNTY OF HANCOCK

I, JOHN D. RUTHERFORD, JR., Clerk of the Chancery Court of said County, hereby certify that the foregoing instrument of writing was filed in my office for record on the 6 day of October, 1977, at 11:50 o'clock A. M., and duly recorded in Oil and Gas Lease Record Book No. 32, Page No. 585-526

WITNESS my hand and seal of said Court, this 14 day of October, 1977.

JOHN D. RUTHERFORD, JR., Chancery Clerk

By Dorothy Pennington, D.C.

824

Oil

BEST AVAILABLE COPY

C-37 02-01-0908

Producer 88-D9403 (Revised Oct. 1, 1968) With Pooling Provision.

OIL, GAS AND MINERAL LEASE BOOK 32 PAGE 577

THIS AGREEMENT made this 19th day of August 19 77 between STATE MINERAL LEASE COMMISSION, for and on behalf of the STATE OF MISSISSIPPI

P. O. Box 220, Jackson, Mississippi 39205

Lessor (whether one or more) whose address is, and SAGA PETROLEUM U.S. INC., 2000 West Loop South, Houston, Texas 77027 Lessee, WITNESSETH:

1. Lessor in consideration of ---Ninety-Eight Thousand Seventy-Eight and 52/100---------- Dollars ($ 98,078.52), in hand paid, of the royalties herein provided, and of the agreements of Lessee herein contained, hereby grants, leases and lets exclusively unto Lessee for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals, laying pipe lines, building roads, tanks, power stations, telephone lines and other structures thereon, to produce, save, take care of, treat, transport and own said products, and housing its employees, the following described land in Hancock County, Mississippi, to-wit:

All State-owned lands subject to the ebb and flow of the tide and which are below the watermark of ordinary (mean) high tide (both tidelands and submerged lands) in the following claims and/or sections, or portions thereof, estimated to comprise 238.57 acres:

TOWNSHIP 8 SOUTH, RANGE 14 WEST

Tract 2: Section 8, Noel Jourdan Claim 28 (said claim being also Section 24), that part of John J. Jourdan Claim 23 (said claim being also Section 23), which lies South of a straight line connecting the North line of Section 8 with the North line of Noel Jourdan Claim 28 (said claim also being Section 24), and that part of John J. Jourdan Claim 3 (said claim being also Section 17), which lies North of a straight line connecting the South line of Section 18 and the South line of Noel Jourdan Claim 28 (said claim being also Section 24). 238.57 acres

8.00

STATE OF MISSISSIPPI

It is understood that this lease will cover only oil and gas and all constituent products produced therewith (both hydrocarbon and non-hydrocarbon), and sulphur and that the words "all other minerals" are deleted wherever they appear in this lease form. Paragraph 3 of this lease is hereby amended to read one-fourth (1/4th) royalty on oil and gas and all constituent products produced therewith (both hydrocarbon and non-hydrocarbon); further the royalty for sulphur shall be $2.00 per long ton.

This lease also covers and includes all land owned or claimed by Lessor adjacent or contiguous to the land particularly described above, whether the same be in said section or sections, grant or grants, or in adjacent sections or grants, although not included within the boundaries of the land particularly described above. For the purpose of calculating the rental payments hereinafter provided for, said land is estimated to comprise 238.57 acres, whether it actually comprises more or less.

2. Subject to the other provisions herein contained, this lease shall be for a term of three (3) years from this date (called "primary term") and as long thereafter as oil, gas or other mineral is produced from said land or lands with which said land is pooled hereunder.

3. The royalties to be paid by Lessee are: (a) on oil, one-eighth of that produced and saved from said land, the same to be delivered at the wells or to the credit of Lessor into the pipe line to which the wells may be connected; Lessee may from time to time purchase any royalty oil in its possession, paying the market price therefor prevailing for the field where produced on the date of purchase, or either pay such interest to bear its proportion of any expense of treating unmerchantable oil to render it merchantable as provided; (b) on gas, including casinghead gas or other gaseous substances, produced from said land and sold or used off the premises or in the manufacture of gasoline or other product therefrom, the market value at the well of one-eighth of the gas so sold or used, provided that on gas sold at the wells the royalty shall be one-eighth of the amount realized from such sale; where gas from a gas well is not sold or used, Lessee may pay as royalty $100.00 per well per year and if such payment is made it will be considered that gas is being produced within the meaning of Paragraph 2 hereof; and (c) on all other minerals mined and marketed, one-tenth either in kind or value at the well or mine, at Lessee's election, except that on sulphur mined and marketed, the royalty shall be fifty cents per long ton. Lessee shall have free use of oil, gas, coal, wood and water from Lessor's wells, for all operations hereunder, and the royalty on oil, gas and coal shall be computed after deducting any so used. Lessee shall have the privilege at his risk and expense of using gas from any gas well on said land for stoves and inside lights in the principal dwelling thereon free of any surplus gas not needed for operations hereunder.

4. Lessee, at its option, is hereby given the right and power to pool or combine the acreage covered by this lease or any portion thereof with other land, lease or leases in the immediate vicinity thereof, when in Lessee's judgment it is necessary or advisable to do so in order properly to develop and operate said premises in compliance with any lawful spacing rules which may be prescribed for the field in which this lease is situated by any duly authorized authority, or when to do so would, in the judgment of Lessee, promote the conservation of the oil and gas in and under and that may be produced from said premises. Lessee shall execute in writing an instrument identifying and describing the pooled acreage. The entire acreage so pooled into a tract or unit shall be treated, for all purposes except the payment of royalties on production from the pooled unit, as if it were included in this lease. If production is found on the pooled acreage, it shall be treated as if production is had from this lease whether the well or wells be located on the premises covered by this lease or not. In lieu of the royalties elsewhere herein specified, Lessor shall receive on production from a unit so pooled only such portion of the royalty stipulated herein as the amount of his acreage placed in the unit or his royalty interest therein on an acreage basis bears to the total acreage so pooled in the particular unit involved.

5. If operations for drilling are not commenced on said land or on acreage pooled therewith as above provided on or before one year from this date the lease shall then terminate as to both parties, unless on or before such anniversary date Lessee shall pay or tender to Lessor or to the credit of Lessor in the State Mineral Lease Commission, Attorney General, P.O. Box 220, Jackson, Mississippi 39205 (which bank and its successors are Lessor's agent and shall continue as the depositary for all rentals payable hereunder regardless of changes in ownership of said land or the rentals) the sum of Two Hundred Thirty-Eight and 57/100---------- Dollars ($ 238.57), herein called rental, which shall cover the privilege of deferring commencement of drilling operations for a period of twelve (12) months. In like manner and upon like payments or tenders annually the commencement of drilling operations may be further deferred for successive periods of twelve (12) months each during the primary term. The payment or tender of rental may be made to the above or draft of Lessor mailed or delivered to Lessor or to said bank on or before such date of payment. If such bank (or any successor bank) should fail, liquidate or be succeeded by another bank, or for any reason fail or refuse to accept rental, Lessor shall not be held in default for failure to make such payment or tender of rental until thirty (30) days after Lessor shall deliver to Lessee a proper recordable instrument, naming another bank as agent to receive such payments or tenders. The down cash payment is consideration for this lease according to its terms and shall not be allocated as mere rental for a period. Lessee may at any time or times execute and deliver to Lessor or to the depositary above named or place of record a release or releases covering any portion or portions of the above described premises and thereby surrender this lease as to such portion or portions and be relieved of all obligations as to the acreage surrendered, and thereafter the rentals payable hereunder shall be reduced in the proportion that the acreage covered hereby is reduced by said release or releases.

6. If prior to discovery of oil, gas or other mineral on said land or on acreage pooled therewith Lessee should drill a dry hole or holes thereon, or if after discovery of oil, gas or other mineral, the production thereof should cease from any cause, this lease shall not terminate if Lessee commences additional drilling or reworking operations within 60 days thereafter or if no within the primary term, commences or resumes the payment or tender of rentals or commences operations for drilling or reworking on or before the rental paying date next coming after the expiration of 60 days from date of completion of any dry hole or cessation of production. If at any time subsequent to sixty (60) days prior to the beginning of the last year of the primary term and prior to the discovery of oil, gas or other mineral on said land, or on acreage pooled therewith, Lessee should drill a dry hole thereon, no rental payment or operations are necessary in order to keep the lease in force during the remainder of the primary term. If at the expiration of the primary term, oil, gas or other mineral is not being produced on said land, or on acreage pooled therewith, but Lessee is then engaged in drilling or reworking operations thereon or shall have completed a dry hole thereon within sixty (60) days prior to the end of the primary term, the lease shall remain in force so long as operations are prosecuted with no cessation of more than sixty (60) consecutive days, and if they result in the production of oil, gas or other minerals, so long thereafter as oil, gas or other minerals is produced from said land or acreage pooled therewith. In the event a well or wells producing oil or gas in paying quantities should be brought to an adjacent land and within one hundred fifty (150) feet of and draining the leased premises, or acreage pooled therewith, Lessee agrees to drill such offset well or wells as a reasonably prudent operator would drill under the same or similar circumstances.

7. Lessee shall have the right at any time during or after the expiration of this lease to remove all property and fixtures placed by Lessee on said land, including the right to draw and remove all casing. When required by Lessor, Lessee will bury all pipe lines below ordinary plow depth, and no well shall be drilled within two hundred (200) feet of any residence or barn now on said land without Lessee's consent. Lessee shall be responsible for all damages caused by Lessee's operations hereunder other than damages necessarily caused by the exercise of the rights herein granted.

8. The rights of either party hereunder may be assigned in whole or in part, and the provisions hereof shall extend to their heirs, successors and assigns; but no change or division in ownership of the land, rentals or royalties, however accomplished, shall operate to enlarge the obligations or diminish the rights of Lessee; and no change or division in such ownership shall be binding on Lessee until thirty (30) days after Lessee shall have been furnished by the party making such change or division with a certified copy of recorded instrument or instruments evidencing same. In the event of fractional ownership of the rentals or royalties, the rentals to be paid Lessor shall be proportionately reduced in accordance with the net acreage interest held by each. Lessee may pay or tender such rentals or royalties to the credit of any or all such owners. Should any one or more of the parties named as Lessor fail to execute this lease, it shall nevertheless be binding upon all such parties who do execute it as Lessor. The word "Lessor" as used in this lease, whether one or more than one person is named as Lessor herein, shall mean any one of them from whom full rental or royalty payment is received, or who executes a ratification hereof, or who owns an interest in said land, and all of them. All of the provisions of this lease shall inure to the benefit of and be binding upon each party who executes it without regard to whether it is executed by all those named herein as Lessor.

9. Lessee shall have the right to use, free of cost, gas, oil and water produced on said land for its operations thereon, except water from the wells of Lessor. When requested by Lessor in writing, Lessee shall bury its pipe lines below plow depth. No well shall be drilled nearer than 200 feet to the house or barn now on said land without the consent of the Lessor. Lessee shall pay for damages caused by its operations to growing crops on said land. Lessee shall have the right at any time to remove all machinery, fixtures, houses, buildings and other structures placed on said land, including the right to draw and remove casing.

10. In the event Lessor considers that operations are not being conducted in compliance with this lease, Lessor shall notify Lessee in writing, setting forth in what manner it is claimed that Lessee has failed to comply with its obligations hereunder. If Lessee fails to comply with its obligations hereunder within sixty (60) days after such notice is received, Lessor may cancel this lease as to all or any part of the land described herein with respect to which Lessee is then in default by filing for record a written declaration to that effect after the lapse of said sixty (60) day period. Thereupon Lessee shall be relieved of all obligations thereafter accruing as to the acreage surrendered.

11. Lessor hereby warrants and agrees to defend the title to the land herein described, and agrees that Lessee at its option may pay and discharge any taxes, mortgages or liens existing, levied or assessed on or against the above described lands. If Lessee exercises such option, it shall be subrogated to the rights of the party to whom payment is made, and, in addition to its other rights, may reimburse itself out of any royalties or other payments then or thereafter accruing to Lessor. If Lessor owns less than the full mineral estate in all or any part of the land described herein, the royalties and rentals provided for herein shall be paid Lessor only in the proportion which Lessor's interest bears to the whole and undivided mineral estate in such land.

12. All express or implied covenants of this lease shall be subject to all Federal and State laws, executive orders, rules or regulations, and this lease shall not be terminated, in whole or in part, nor Lessee held liable in damages for failure to comply therewith, if compliance is prevented by, or if such failure is the result of, any such law, order, rule or regulation.

13. Lessor hereby agrees that during the primary term hereof, should Lessor receive a bona fide offer which Lessor is willing to accept from any party offering to purchase from Lessor a lease covering any or all of the above described land, Lessee shall have the prior and preferential right to purchase such lease from Lessor by matching such bona fide offer within fifteen days after Lessee receives from Lessor a true copy of such offer.

14. Lessee may at any time and from time to time deliver to Lessor or file for record a release of this lease as to any part or all of said land and be relieved of all obligations thereafter accruing as to the acreage surrendered.

15. Should any one or more of the parties hereinabove named as Lessor fail to execute this lease, it shall nevertheless be binding upon all such parties who do execute it as Lessor. All the provisions of this lease shall inure to the benefit of and be binding upon the parties hereto, their heirs, successors, assigns and successors in title.

16. Lessor hereby warrants and agrees to defend the title to the land herein described, and agrees that Lessee at its option may pay and discharge any taxes, mortgages or liens existing, levied or assessed on or against the above described lands. If Lessee exercises such option, it shall be subrogated to the rights of the party to whom payment is made, and, in addition to its other rights, may reimburse itself out of any royalties or other payments then or thereafter accruing to Lessor. If Lessor owns less than the full mineral estate in all or any part of the land described herein, the royalties and rentals provided for herein shall be paid Lessor only in the proportion which Lessor's interest bears to the whole and undivided mineral estate in such land.

17. All express or implied covenants of this lease shall be subject to all Federal and State laws, executive orders, rules or regulations, and this lease shall not be terminated, in whole or in part, nor Lessee held liable in damages for failure to comply therewith, if compliance is prevented by, or if such failure is the result of, any such law, order, rule or regulation.

18. Lessor hereby agrees that during the primary term hereof, should Lessor receive a bona fide offer which Lessor is willing to accept from any party offering to purchase from Lessor a lease covering any or all of the above described land, Lessee shall have the prior and preferential right to purchase such lease from Lessor by matching such bona fide offer within fifteen days after Lessee receives from Lessor a true copy of such offer.

19. Lessee may at any time and from time to time deliver to Lessor or file for record a release of this lease as to any part or all of said land and be relieved of all obligations thereafter accruing as to the acreage surrendered.

20. Should any one or more of the parties hereinabove named as Lessor fail to execute this lease, it shall nevertheless be binding upon all such parties who do execute it as Lessor. All the provisions of this lease shall inure to the benefit of and be binding upon the parties hereto, their heirs, successors, assigns and successors in title.

21. Lessor hereby warrants and agrees to defend the title to the land herein described, and agrees that Lessee at its option may pay and discharge any taxes, mortgages or liens existing, levied or assessed on or against the above described lands. If Lessee exercises such option, it shall be subrogated to the rights of the party to whom payment is made, and, in addition to its other rights, may reimburse itself out of any royalties or other payments then or thereafter accruing to Lessor. If Lessor owns less than the full mineral estate in all or any part of the land described herein, the royalties and rentals provided for herein shall be paid Lessor only in the proportion which Lessor's interest bears to the whole and undivided mineral estate in such land.

22. All express or implied covenants of this lease shall be subject to all Federal and State laws, executive orders, rules or regulations, and this lease shall not be terminated, in whole or in part, nor Lessee held liable in damages for failure to comply therewith, if compliance is prevented by, or if such failure is the result of, any such law, order, rule or regulation.

23. Lessor hereby agrees that during the primary term hereof, should Lessor receive a bona fide offer which Lessor is willing to accept from any party offering to purchase from Lessor a lease covering any or all of the above described land, Lessee shall have the prior and preferential right to purchase such lease from Lessor by matching such bona fide offer within fifteen days after Lessee receives from Lessor a true copy of such offer.

24. Lessee may at any time and from time to time deliver to Lessor or file for record a release of this lease as to any part or all of said land and be relieved of all obligations thereafter accruing as to the acreage surrendered.

25. Should any one or more of the parties hereinabove named as Lessor fail to execute this lease, it shall nevertheless be binding upon all such parties who do execute it as Lessor. All the provisions of this lease shall inure to the benefit of and be binding upon the parties hereto, their heirs, successors, assigns and successors in title.

26. Lessor hereby warrants and agrees to defend the title to the land herein described, and agrees that Lessee at its option may pay and discharge any taxes, mortgages or liens existing, levied or assessed on or against the above described lands. If Lessee exercises such option, it shall be subrogated to the rights of the party to whom payment is made, and, in addition to its other rights, may reimburse itself out of any royalties or other payments then or thereafter accruing to Lessor. If Lessor owns less than the full mineral estate in all or any part of the land described herein, the royalties and rentals provided for herein shall be paid Lessor only in the proportion which Lessor's interest bears to the whole and undivided mineral estate in such land.

27. All express or implied covenants of this lease shall be subject to all Federal and State laws, executive orders, rules or regulations, and this lease shall not be terminated, in whole or in part, nor Lessee held liable in damages for failure to comply therewith, if compliance is prevented by, or if such failure is the result of, any such law, order, rule or regulation.

28. Lessor hereby agrees that during the primary term hereof, should Lessor receive a bona fide offer which Lessor is willing to accept from any party offering to purchase from Lessor a lease covering any or all of the above described land, Lessee shall have the prior and preferential right to purchase such lease from Lessor by matching such bona fide offer within fifteen days after Lessee receives from Lessor a true copy of such offer.

29. Lessee may at any time and from time to time deliver to Lessor or file for record a release of this lease as to any part or all of said land and be relieved of all obligations thereafter accruing as to the acreage surrendered.

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OIL, GAS AND MINERAL LEASE BOOK 32 PAGE 578

9. The breach by Lessee of any obligation hereunder shall not work a forfeiture or termination of this lease nor be cause for cancellation hereof in whole or in part, save as herein expressly provided. If the obligation should require the drilling of a well or wells, Lessee shall have ninety (90) days after the receipt of written notice by Lessor from Lessor specifically stating the breach allowed to Lessee within which to begin operations for the drilling of any such well or wells, and the only penalty for failure so to do shall be the termination of this lease save as to forty (40) acres for each well being worked on or producing oil or gas, to be selected by Lessee so that each forty (40) acre tract will embrace one such well. After the discovery of oil, gas or other mineral in paying quantities on said premises, Lessee shall reasonably develop the acreage retained hereunder and capable of producing oil, gas or other mineral in paying quantities, but in discharging this obligation it shall in no event be required to drill more than one well per forty (40) acres of the area retained hereunder and capable of producing oil, gas or other mineral in paying quantities.

10. Lessor hereby warrants and agrees to defend the title to the said land and agrees that Lessee shall have the right at any time to redeem for Lessor, by payment, any mortgage, taxes or other liens on the above described lands, in the event of default of payment by Lessor, and be subrogated to the rights of the holder thereof and may reimburse itself out of any royalties or shut-in royalties payable to Lessor hereunder. If Lessor owns an interest in said land less than the entire fee simple estate, then the royalties and rentals to be paid Lessor shall be reduced proportionately. Failure of Lessee to reduce rental paid hereunder shall not impair the right of Lessee to reduce royalties.

11. Should Lessee be prevented from complying with any express or implied covenant of this lease, from conducting drilling or reworking operations thereon or from producing oil or gas therefrom by reason of scarcity of or inability to obtain or to use equipment or material, or by operation of force majeure, or any Federal or state law or any order, rule or regulation of governmental authority, then while so prevented, Lessee's obligation to comply with such covenant shall be suspended, and Lessee shall not be liable in damages for failure to comply therewith; and this lease shall be extended while and so long as Lessee is prevented by any such cause from conducting drilling or reworking operations on or from producing oil or gas from the leased premises; and the time while Lessee is so prevented shall not be counted against Lessee, anything in this lease to the contrary notwithstanding.

12. The undersigned Lessor, for himself and his heirs, successors and assigns, hereby surrenders and releases all rights of homestead in the premises herein described, in so far as said rights of homestead may in any way affect the purpose for which this lease is made as recited herein, and agrees that the annual drilling deferment rental payments made to Lessor as herein provided will fully protect this lease as to the full interests of the undersigned.

In WITNESS WHEREOF, this instrument is signed, sealed and delivered on the date first above written.

WITNESS:

STATE MINERAL LEASE COMMISSION (SEAL)

BY _____ (SEAL)

CLIFF FINCH, Governor and (SEAL)

Ex Officio Chairman (SEAL)

BY _____ (SEAL)

A. F. SUMMER, Attorney General and

Ex Officio Secretary

STATE OF MISSISSIPPI

COUNTY OF HINDS

BE IT REMEMBERED, that on this day came and appeared before me, the undersigned authority in and for the jurisdiction aforesaid, and while within my official jurisdiction, the within named CLIFF FINCH and A. F. SUMMER, personally known to me to be the Governor of the State of Mississippi and Ex Officio Chairman of the State Mineral Lease Commission, and the Attorney General of the State of Mississippi and Ex Officio Secretary of the State Mineral Lease Commission, respectively, who acknowledged before me that they signed, sealed and delivered the foregoing Oil, Gas and Mineral Lease as the act and deed of said Commission for and on behalf of the State of Mississippi, on the date and for the purposes therein stated, first being duly authorized so to do.

GIVEN under my hand and official seal of office, this the 26th day of August, 1977

Mrs. J. J. Langford

NOTARY PUBLIC

My Commission Expires:

My Commission Expires Sept. 15, 1978.

STATE OF MISSISSIPPI,
COUNTY OF HANCOCK

I, JOHN D. RUTHERFORD, JR., Clerk of the Chancery Court of said County, hereby certify that the foregoing instrument of writing was filed in my office for record on the 6 day of October, 1977, at 11:46 o'clock A. M., and duly recorded in Oil and Gas Lease Record Book No. 92, Page No. 577-578

WITNESS my hand and seal of said Court, this 14 day of October, 1977.

JOHN D. RUTHERFORD, JR., Chancery Clerk

By _____ D. C.

Oil, Gas a

By _____ 4.50

Prepare it for

No.

Dated

No. Acres

Term

This instrument was fi

day of

Book

of the

Page

When

02-04-0909

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02-04-0909

C-38

Producers 88-P3001 (Revised Oct. 1, 1968) With Pooling Provision.

OIL, GAS AND MINERAL LEASE

BOOK 32 PAGE 57[illegible]

THIS AGREEMENT made this 19th day of August 19 77 between STATE MINERAL LEASE COMMISSION, for and on behalf of the STATE OF MISSISSIPPI

P. O. Box 220, Jackson, Mississippi 39205

Lessor (whether one or more) whose address is: and SAGA PETROLEUM U.S. INC., 2000 West Loop South, Houston, Texas 77027 Lessee, WITNESSETH:

1. Lessor in consideration of ----Two Hundred Forty Thousand Five Hundred Twenty-two and 73/100---- Dollars ($ 240,522.73 in hand paid, of the royalties herein provided, and of the agreement of Lessee herein contained, hereby grants, leases and lets exclusively unto Lessee for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals, laying pipe lines, building roads, tanks, power stations, telephone lines and other structures thereon to produce, save, take care of, treat, transport and own said products, and housing its employees, the following described land in Hancock County, Mississippi, to-wit:

All State-owned lands subject to the ebb and flow of the tide and which are below the watermark of ordinary (mean) high tide (both tidelands and submerged lands) in the following claims and/or sections, or portions thereof, estimated to comprise 575.73 acres:

18.00

TOWNSHIP 8 SOUTH, RANGE 14 WEST

Tract 3: Sections 9, 10 and Noel Jourdan Claim 31 . . . 575.73 acres

It is understood that this lease will cover only oil and gas and all constituent products produced therewith (both hydrocarbon and non-hydrocarbon), and sulphur and that the words "all other minerals" are deleted wherever they appear in this lease form. Paragraph 3 of this lease is hereby amended to read one-fourth (1/4th) royalty on oil and gas and all constituent products produced therewith (both hydrocarbon and non-hydrocarbon); further the royalty for sulphur shall be $2.00 per long ton.

This lease also covers and includes all land owned or claimed by Lessor adjacent or contiguous to the land particularly described above, whether the same be in said section or sections, grant or grants, or in adjacent sections or grants, although not included within the boundaries of the land particularly described above. For the purpose of calculating the rental payments hereinafter provided for, said land is estimated to comprise 575.73 acres, whether it actually comprises more or less.

2. Subject to the other provisions herein contained, this lease shall be for a term of (3) three from this date (called "primary term") and as long thereafter as oil, gas or other mineral is produced from said land or lands with which said land is pooled hereunder.

3. The royalties to be paid by Lessee are: (a) on oil, one-eighth of that produced and saved from said land, the same to be delivered at the wells or to the credit of Lessor into the pipe line to which the wells may be connected; Lessee may from time to time purchase any royalty oil in its possession, paying the market price therefor prevailing for the field where produced on the date of purchase, in either case such interest to bear its proportion of any expense of treating unmerchantable oil to render it merchantable as crude; (b) on gas, including casinghead gas or other gaseous substances, produced from said land and sold or used off the premises or in the manufacture of gasoline or other product therefrom, the market value at the well of one-eighth of the gas so sold or used, provided that on gas sold at the wells the royalty shall be one-eighth of the amount realized from such sale; where gas from a gas well is not sold or used, Lessee may pay as royalty $100.00 per well per year and if such payment is made it will be considered that gas is being produced within the meaning of Paragraph 2 hereof; and (c) on all other minerals mined and marketed, one-tenth either in kind or value at the well or mine, at Lessee's election, except that on sulphur mined and marketed, the royalty shall be fifty cents ($0.50) per long ton. Lessee shall have free use of oil, gas, coal, wood and water from said land, except water from Lessor's wells, for all operations hereunder, and the royalty on oil, gas and coal shall be computed after deducting any so used. Lessor shall have the privilege at his risk and expense of using gas from any gas well on said land for stoves and inside lights in the principal dwelling thereon out of any surplus gas not needed for operations hereunder.

4. Lessee, at its option, is hereby given the right and power to pool or combine the acreage covered by this lease or any portion thereof with other land, lease or leases in the immediate vicinity thereof, when in Lessee's judgment it is necessary or advisable to do so in order properly to develop and operate said premises in compliance with any lawful spacing rules which may be prescribed for the field in which this lease is situated by any duly authorized authority, or when to do so would, in the judgment of Lessee, promote the conservation of the oil and gas in and under and that may be produced from said premises. Lessee shall execute in writing an instrument identifying and describing the pooled acreage. The entire acreage so pooled into a tract or unit shall be treated, for all purposes except the payment of royalties on production from the pooled unit, as if it were included in this lease. If production is found on the pooled acreage, it shall be treated as if production is had from this lease, whether the well or wells be located on the premises covered by this lease or not. In lieu of the royalties elsewhere herein specified, Lessor shall receive on production from a unit so pooled only such portion of the royalty stipulated herein as the amount of his acreage placed in the unit or his royalty interest therein on an acreage basis bears to the total acreage so pooled in the particular unit involved.

5. If operations for drilling are not commenced on said land or on acreage pooled therewith as above provided on or before one year from this date the lease shall then terminate as to both parties, unless on or before such anniversary date Lessee shall pay or tender to Lessor or to the credit of State Mineral Lease Commission, Attorney General, P.O. Box 220, Jackson 39205 Mississippi at ____ Bank at ____ Mississippi, in ____ (which bank and its successors are Lessor's agent and shall continue as the depository for all rentals payable hereunder regardless of changes in ownership of said land or the rentals) the sum of ----Five Hundred Seventy-Five and 73/100---------- Dollars ($ 575.73), (herein called rentals), which shall cover the privilege of deferring commencement of drilling operations for a period of twelve (12) months. In like manner and upon like payments or tenders annually the commencement of drilling operations may be further deferred for successive periods of twelve (12) months each during the primary term. The payment or tender of rental may be made by the check or draft of Lessee mailed or delivered to Lessor or to said bank on or before such date of payment. If such bank (or any successor bank) should fail, liquidate or be succeeded by another bank, or for any reason fail or refuse to accept rental, Lessee shall not be held in default for failure to make such payment or tender of rental until thirty (30) days after Lessor shall deliver to Lessee a proper recordable instrument, naming another bank as agent to receive such payments or tenders. The down cash payment is consideration for this lease according to its terms and shall not be allocated as more rental for a period. Lessee may at any time or times execute and deliver to Lessor or to the depository above named or place of record a release or releases covering any portion or portions of the above described premises and thereby surrender this lease as to such portions or portions and be relieved of all obligations as to the acreage surrendered, and thereafter the rentals payable hereunder shall be reduced in the proportion that the acreage covered hereby is reduced by said release or releases.

6. If prior to discovery of oil, gas or other mineral on said land or on acreage pooled therewith Lessee should drill a dry hole or holes thereon, or if after discovery of oil, gas or other mineral, the production thereof should cease from any cause, this lease shall not terminate if Lessee commences additional drilling or reworking operations within 60 days thereafter or if it be within the primary term, commences or resumes the payment or tender of rentals or commences operations for drilling or reworking on or before the rental paying date next ensuing after the expiration of 60 days from date of cessation of any such operations. If at any time subsequent to sixty (60) days prior to the beginning of the last year of the primary term and prior to the discovery of oil, gas or other mineral on said land, or on acreage pooled therewith, Lessee should drill a dry hole thereon, no rental payment or operations are necessary in order to keep the lease in force during the remainder of the primary term. If at the expiration of the primary term, oil, gas or other mineral is not being produced on said land, or on acreage pooled therewith, but Lessee is then engaged in drilling or reworking operations thereon or shall have completed a dry hole thereon within sixty (60) days prior to the end of the primary term, the lease shall remain in force so long as operations are prosecuted with no cessation of more than sixty (60) consecutive days, and if they result in the production of oil, gas or other mineral, so long thereafter as oil, gas or other mineral is produced from said land or acreage pooled therewith. In the event a well or wells producing oil or gas in paying quantities should be brought in on an adjacent land and within one hundred fifty (150) feet of and draining the leased premises, or acreage pooled therewith, Lessee agrees to drill such offset wells as a reasonably prudent operator would drill under the same or similar circumstances.

7. Lessee shall have the right at any time during or after the expiration of this lease to remove all property and fixtures placed by Lessee on said land, including the right to draw and remove all casing. When required by Lessor, Lessee will bury all pipe lines below ordinary plow depth, and no well shall be drilled within two hundred (200) feet of any residence or barn now on said land without Lessor's consent. Lessee shall be responsible for all damages caused by Lessee's operations hereunder other than damages necessarily caused by the exercise of the rights herein granted.

8. The rights of either party hereunder may be assigned in whole or in part, and the provisions hereof shall extend to their heirs, successors and assigns; but no change or division in ownership of the land, rentals or royalties, however accomplished, shall operate to enlarge the obligations or diminish the rights of Lessee, and no change or division in such ownership shall be binding on Lessee until thirty (30) days after Lessee shall have been furnished by registered U. S. mail at Lessee's principal place of business with a certified copy of recorded instrument or instruments evidencing same. In the event of assignment hereof in whole or in part liability for breach of any obligation hereunder shall rest exclusively upon the owner of this lease or of a portion thereof who commits such breach. In the event of the death of any person entitled to rentals hereunder, Lessor may pay or tender such rentals to the credit of the deceased or the estate of the deceased until such time as Lessee is furnished with proper evidence of the appointment and qualifications of an executor or administrator of the estate, or if there be none, then until Lessee is furnished with evidence satisfactory to it as to the heirs or devisees of the deceased and that all debts of the estate have been paid. If at any time two or more persons be entitled to participate in the rental payable hereunder, Lessee may pay or tender said rental jointly to such persons or to their guardian or conservator, or, at Lessee's election, the proportionate part of said rental to which each participant is entitled may be paid or tendered to him separately or to his separate credit in said depository; and payment or tender to any participant of his portion of the rentals hereunder shall maintain this lease as to such participant. In event of assignment of this lease as to a segregated portion of said land, the rentals payable hereunder shall be apportionable as between the several leasehold owners ratably according to the surface area of each, and default in rental payment by one shall not affect the rights of other leasehold owners hereunder. If any two or more parties become entitled to royalty hereunder, Lessee may withhold payment thereof unless and until furnished with a recordable instrument executed by all such parties designating an agent to receive payment for all.

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IN EVIDENCE

BEST AVAILABLE COPY

9. This breach by Lessee of any obligation hereunder shall not work a forfeiture or termination of this lease nor be cause for cancellation hereof in whole or in part save as herein expressly provided. If the obligation should require the drilling of a well or wells, Lessee shall have ninety (90) days after the receipt of written notice by Lessor from Lessor specifically stating the breach alleged by Lessee within which to begin operations for the drilling of any such well or wells; and the only penalty for failure so to do shall be the termination of this lease save as to forty (40) acres for each well being worked on or producing oil or gas, to be selected by Lessee so that each forty (40) acre tract will embrace one such well. After the discovery of oil, gas or other mineral in paying quantities on said premises, Lessee shall reasonably develop the acreage retained hereunder, but in discharging this obligation it shall in no event be required to drill more than one well per forty (40) acres of the area retained hereunder and capable of producing oil, gas or other mineral in paying quantities.

12. Lessee hereby warrants and agrees to defend the title to said land and agrees that Lessor at its option, may discharge any tax, mortgage or other lien upon said land, either existing or hereafter levied or asserted, and may reimburse itself out of any royalty or shut-in royalty payments due or that may become due hereunder. If Lessor owns an interest in said land less than the entire fee simple estate, then the royalties and rentals to be paid Lessor shall be reduced proportionately. Failure of Lessee to receive rental paid hereunder shall not impair the right of Lessor to receive royalties.

13. Should Lessee be prevented from complying with any express or implied covenant of this lease, from conducting drilling or reworking operations thereon or from producing oil or gas therefrom by reason of scarcity of or inability to obtain or to use equipment or material, or by operation of force majeure, or any Federal or state law or any order, rule or regulation of governmental authority, then while so prevented, Lessee's obligation to comply with such covenant shall be suspended, and Lessee shall not be liable in damages for failure to comply therewith; and this lease shall be extended while and so long as Lessee is prevented by any such cause from conducting drilling or reworking operations on or from producing oil or gas from the leased premises; and the time while Lessee is so prevented shall not be counted against Lessee, anything in this lease to the contrary notwithstanding.

15. The undersigned Lessor, for himself and his heirs, successors and assigns, hereby surrenders and releases all rights of homestead in the premises described herein so far as said rights of homestead may in any way affect the purposes for which this lease is made as recited herein, and agrees that the annual drilling deferment rental payments made to Lessor as herein provided will fully protect this lease as to the full interests of the undersigned.

In WITNESS WHEREOF, this instrument is signed, sealed and delivered on the date first above written.

WITNESSES:

STATE MINERAL LEASE COMMISSION (SEAL)

(SEAL)

BY Cliff Finch (SEAL)

CLIFF FINCH, Governor and
Ex Officio Chairman (SEAL)

(SEAL)

BY A. F. Summer (SEAL)

A. F. SUMMER, Attorney General and
Ex Officio Secretary

STATE OF MISSISSIPPI
COUNTY OF HINDS

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, and while within my official jurisdiction, the within named CLIFF FINCH and A. F. SUMMER, personally known to me to be the Governor of the State of Mississippi and Ex Officio Chairman of the State Mineral Lease Commission, and the Attorney General of the State of Mississippi and Ex Officio Secretary of the State Mineral Lease Commission, respectively, who acknowledged before me that they signed, sealed and delivered the foregoing Oil, Gas and Mineral Lease as the act and deed of said Commission for and on behalf of the State of Mississippi, on the date and for the purposes therein stated, first being duly authorized so to do.

GIVEN under my hand and official seal of office, this the 26th day of August, 1977.

Myra J. J. Langford
NOTARY PUBLIC

My Commission Expires:

My Commission Expires Sept. 15, 1979

Sworn to and subscribed before me, this the _____ day of _____, 19__.

STATE OF MISSISSIPPI,
COUNTY OF HANCOCK

I, JOHN D. RUTHERFORD, JR., Clerk of the Chancery Court of said County, hereby certify that the foregoing instrument of writing was filed in my office for record on the 14 day of October, 1977, at 11:47 o'clock A. M., and duly recorded in Oil and Gas Lease Record Book No. 32, Page No. 579-580

WITNESS my hand and seal of said Court, this 14 day of October, 1977.

JOHN D. RUTHERFORD, JR., Chancery Clerk

By Pamela Rivenbark, D. C.

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C-39 BOOK 32 PAGE 375

OIL, GAS AND MINERAL LEASE

THIS AGREEMENT made this 19th day of August 19 77 between STATE MINERAL LEASE COMMISSION, for and on behalf of the STATE OF MISSISSIPPI

Lessor (whether one or more) whose address is P. O. Box 220, Jackson, Mississippi 39205 and SAGA PETROLEUM U.S. INC., 2000 West Loop South, Houston, Texas 77027 Lessee, WITNESSETH:

1. Lessor in consideration of Two Hundred Thirty-Nine Thousand Two Hundred Two and 52/100- Dollars ($ 239,202.52), to hand paid, of the royalties herein provided, and of the agreement of Lessee herein contained, hereby grants, leases and conveys exclusively unto Lessee for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals, laying pipe lines, building roads, tanks, power stations, telephone lines and other structures thereon to produce, save, take care of, treat, transport and own said products, and housing its employees, the following described land in Hancock County, Mississippi, to-wit:

All State-owned lands subject to the ebb and flow of the tide and which are below the watermark of ordinary (mean) high tide (both tidelands and submerged lands) in the following claims and/or sections, or portions thereof, estimated to comprise 568.15 acres:

18.00

TOWNSHIP 8 SOUTH, RANGE 14 WEST

Tract 1: Sections 3, 4 and part of John J. Jourdan Claim 23 (said claim being also Section 23), which lies North of a line connecting the North line of Section 8 and the North line of Noel Jourdan Claim 28 (said claim being also Section 24). 568.15 acres

It is understood that this lease will cover only oil and gas and all constituent products produced therewith (both hydrocarbon and non-hydrocarbon), and sulphur and that the words "all other minerals" are deleted wherever they appear in this lease form. Paragraph 3 of this lease is hereby amended to read one-fourth (1/4th) royalty on oil and gas and all constituent products produced therewith (both hydrocarbon and non-hydrocarbon); further the royalty for sulphur shall be $2.00 per long ton.

This lease also covers and includes all land owned or claimed by Lessor adjacent or contiguous to the land particularly described above, whether the same be in said section or sections, grant or grants, or in adjacent sections or grants, although not included within the boundaries of the land particularly described above. For the purpose of calculating the rental payments hereinafter provided for, said land is estimated to comprise 568.15 acres, whether it actually comprises more or less.

2. Subject to the other provisions herein contained, this lease shall be for a term of Three (3) years from this date (called "primary term") and as long thereafter as oil, gas or other mineral is produced from said land or lands with which said land is pooled hereunder.

3. The royalties to be paid by Lessee are: (a) on oil, one-eighth of that produced and saved from said land, the same to be delivered at the wells or to the credit of Lessor into the pipe line to which the wells may be connected; Lessee may from time to time purchase any royalty oil in its possession, paying the market price therefor prevailing for the field where produced on the date of purchase, in either case such interest to bear its proportion of any expense of treating unmerchantable oil to render it merchantable as crude; (b) on gas, including casinghead gas or other gaseous substances, produced from said land and sold or used off the premises or in the manufacture of gasoline or other products therefrom, the market value at the well of one-eighth of the gas so sold or used, provided that on gas sold at the wells the royalty shall be one-eighth of the amount realized from such sale; where gas from a gas well is not sold or used, Lessee may pay as royalty $100.00 per well per year and if such payment is made it will be considered that gas is being produced within the meaning of Paragraph 2 hereof; and (c) on all other minerals mined and marketed, one-tenth either in kind or value at the well or mine, at Lessee's election, except that on sulphur mined and marketed, the royalty shall be fifty cents (50¢) per long ton. Lessee shall have free use of oil, gas, coal, wood and water from said land, except water from Lessee's wells, for all operations hereunder, and the royalty on oil, gas and coal shall be computed after deducting any so used. Lessor shall have the privilege at his risk and expense of using gas from any gas well on said land for stoves and inside lights in the principal dwelling thereon out of any portion not needed for operations hereunder.

4. Lessee, at its option, is hereby given the right and power to pool or combine the acreage covered by this lease or any portion thereof with other land, lease or leases in the immediate vicinity thereof, when in Lessee's judgment it is necessary or advisable to do so in order properly to develop and operate said premises in compliance with any lawful spacing rule which may be prescribed for the field in which this lease is situated by any duly authorized authority, or when to do so would, in the judgment of Lessee, promote the conservation of the oil and gas in and under and that may be produced from said premises. Lessee shall execute in writing an instrument identifying and describing the pooled acreage. The entire acreage so pooled into a tract or unit shall be treated, for all purposes except the payment of royalties on production from the pooled unit, as if it were included in this lease. If production is had from this lease, whether the well or wells be located on the premises covered by this lease or on the pooled acreage, it shall be treated as if production is had from this lease, whether the well or wells be located on the premises covered by this lease or not. In lieu of the royalties elsewhere herein specified, Lessor shall receive on production from a unit so pooled only such portion of the royalty stipulated herein as the amount of his acreage placed in the unit or his royalty interest therein on an acreage basis bears to the total acreage so pooled in the particular unit involved.

5. If operations for drilling are not commenced on said land or on acreage pooled therewith as above provided on or before one year from this date the lease shall then terminate as to both parties, unless on or before such anniversary date Lessee shall pay or tender to Lessor or to the credit of Lessor in State Mineral Lease Commission, Attorney General, P. O. Box 220, Jackson, Mississippi, 39205 (which bank and its successors are Lessor's agent and shall continue as the depository for all rentals payable hereunder regardless of changes in ownership of said land or the rentals) the sum of --Five Hundred Sixty-Eight and 15/100-- Dollars ($ 568.15), (herein called rentals), which shall cover the privilege of deferring commencement of drilling operations for a period of twelve (12) months. In like manner and upon like payments or tenders annually the commencement of drilling operations may be further deferred for successive periods of twelve (12) months each during the primary term. The payment or tender of rental may be made by the check or draft of Lessee mailed or delivered to Lessor or to said bank on or before each date of payment. If such bank (or any successor bank) should fail, liquidate or be succeeded by another bank, or for any reason fail or refuse to accept rental, Lessee shall not be held in default for failure to make such payment or tender of rental until thirty (30) days after Lessor shall deliver to Lessee a proper recordable instrument, naming another bank as agent to receive such payments or tenders. The down cash payment is consideration for this lease according to its terms and shall not be allocated as mere rental for a period. Lessee may at any time or times execute and deliver to Lessor or to the depository above named or place of record a release or releases covering any portion or portions of the above described premises and thereby surrender this lease as to such portions or portions and be relieved of all obligations as to the acreage surrendered, and thereafter the rentals payable hereunder shall be reduced in the proportion that the acreage covered hereby is reduced by said release or releases.

6. If prior to discovery of oil, gas or other mineral on said land or on acreage pooled therewith Lessee should drill a dry hole or holes thereon, or if after discovery of oil, gas or other mineral, the production thereof should cease from any cause, this lease shall not terminate if Lessee commences additional drilling or reworking operations within 60 days thereafter or if it be within the primary term, commences or resumes the payment or tender of rentals on or before the expiration of 60 days from date of such cessation of production. If at any time subsequent to sixty (60) days prior to the beginning of the last year of the primary term and prior to the discovery of oil, gas or other mineral on said land, or on acreage pooled therewith, Lessee should drill a dry hole thereon, no rental payments or operations are necessary in order to keep the lease in force during the remainder of the primary term. If at the expiration of the primary term, oil, gas or other mineral is not being produced on said land, or on acreage pooled therewith, but Lessee is then engaged in drilling or reworking operations thereon or shall have completed a dry hole thereon within sixty (60) days prior to the end of the primary term, the lease shall remain in force so long as operations are prosecuted with no cessation of more than sixty (60) consecutive days, and if they result in the production of oil, gas or other mineral, so long thereafter as oil, gas or other mineral is produced from said land or acreage pooled therewith. In the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and within one hundred fifty (150) feet of and draining the leased premises, or acreage pooled therewith, Lessee agrees to drill such offset wells as a reasonably prudent operator would drill under the same or similar circumstances.

7. Lessee shall have the right at any time during or after the expiration of this lease to remove all property and fixtures placed by Lessee on said land, including the right to draw and remove all casing. When required by Lessor, Lessee will bury all pipe lines below ordinary plow depth, and no well shall be drilled within two hundred (200) feet of any residence or barn now on said land without Lessee's consent. Lessee shall be responsible for all damages caused by Lessee's operations hereunder, and shall not commit or cause waste on said land without Lessee's consent. Lessee shall be responsible for all damages caused by Lessee's operations hereunder, and shall not commit or cause waste on said land without Lessee's consent.

8. The rights of either party hereunder may be assigned in whole or in part, and the provisions hereof shall extend to their heirs, successors and assigns; but no change or division in ownership of the land, rentals or royalties, however accomplished, shall operate to enlarge the obligations or diminish the rights of Lessee, and no change or division in such ownership shall be binding on Lessee until thirty (30) days after Lessee shall have been furnished by registered U. S. mail at Lessee's principal place of business with a certified copy of recorded instrument or instruments evidencing same. In the event of assignment hereof in whole or in part, liability for breach of any obligation hereunder shall rest exclusively upon the owner of this lease or of a portion thereof who commits such breach. In the event of the death of any person entitled to rentals hereunder, Lessee may pay or tender such rentals to the credit of the deceased or the estate of the deceased until such time as Lessee is furnished with proper evidence of the appointment and qualifications of an executor or administrator of the estate, or if there be none, then until Lessee is furnished with evidence satisfactory to it as to the heirs or devisees of the deceased, and that all debts of the estate have been paid. If at any time two or more persons are entitled to receive the rentals hereunder, Lessee may pay or tender such rentals jointly to such persons or to their joint credit in the depository named herein, or, at Lessee's election, to the persons entitled thereto separately in the proportions to which each is entitled, or to his separate credit in said depository; and payment or tender to any one of such persons or to such depository shall be effective. In the event of assignment of this lease as to a segregated portion of said land, the rentals payable hereunder shall be apportioned as between the several leasehold owners ratably according to the surface area of each, and default in rental payment by one shall not affect the rights of other leasehold owners hereunder. If six or more parties become entitled to receive rentals hereunder, Lessee may withhold payment thereof unless and until furnished with a recordable instrument executed by all such parties designating an agent to receive payment for all.

EXHIBIT # C-39
IN EVIDENCE

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9. The breach by Lessee of any obligation hereunder shall not work a forfeiture or termination of this lease nor be cause for cancellation hereof in whole or in part save as herein expressly provided. If the obligation should require the drilling of a well or wells, Lessee shall have ninety (90) days after the receipt of written notice by Lessor from Lessee specifically stating the breach alleged by Lessee within which to begin operations for the drilling of any such well or wells; and the only penalty for failure so to do shall be the termination of this lease save as to forty (40) acres for each well being worked on or producing oil or gas, to be selected by Lessee so that each forty (40) acre tract will embrace one such well. After the discovery of oil, gas or other mineral in paying quantities on said premises, Lessee shall reasonably develop the acreage retained hereunder, but in discharging this obligation it shall in no event be required to drill more than one well per forty (40) acres of the area retained hereunder and capable of producing oil, gas or other mineral in paying quantities.

10. Lessee hereby warrants and agrees to defend the title to said land and agrees that Lessor at its option may discharge any tax, mortgage or other lien upon said land, either now existing or hereafter arising in the event Lessee fails to do so, and in event Lessor does so it shall be subrogated to such lien with right to enforce same and apply rentals and royalties accruing hereunder toward satisfying same. Without impairment of Lessee's rights under the warranty in event of failure of title, it is agreed that if Lessor owns an interest in said land less than the entire fee simple estate, then the royalties and rentals to be paid Lessor shall be reduced proportionately. Failure of Lessee to reduce rental paid hereunder shall not impair the right of Lessee to reduce royalties.

11. Should Lessee be prevented from complying with any express or implied covenant of this lease, from conducting drilling or reworking operations thereon or from producing oil or gas therefrom by reason of scarcity of or inability to obtain or to use equipment or material, or by operation of force majeure, or any Federal or state law or any order, rule or regulation of governmental authority, then while so prevented, Lessee's obligation to comply with such covenant shall be suspended, and Lessee shall not be liable in damages for failure to comply therewith; and this lease shall be extended while and so long as Lessee is so prevented by any such cause from conducting drilling or reworking operations on or from producing oil or gas from the leased premises; and the time while Lessee is so prevented shall not be counted against Lessee, anything in this lease to the contrary notwithstanding.

12. The undersigned Lessor, for himself and his heirs, successors and assigns, hereby surrenders and releases all rights of homestead in the premises herein described, in so far as said rights of homestead may in any way affect the purposes for which this lease is made as recited herein, and agrees that the annual drilling deferment rental payments made to Lessor as herein provided will fully protect this lease as to the full interests of the undersigned.

In WITNESS WHEREOF, this instrument is signed, sealed and delivered on the date first above written.

WITNESS:

STATE MINERAL LEASE COMMISSION

(SEAL)

BY Cliff Finch (SEAL)

CLIFF FINCH, Governor and
Ex Officio Chairman (SEAL)

(SEAL)

BY A. F. Summer (SEAL)

A. F. SUMMER, Attorney General
and Ex Officio Secretary

STATE OF MISSISSIPPI
COUNTY OF HINDS

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, and while within my official jurisdiction, the within named CLIFF FINCH and A. F. SUMMER, personally known to me to be the Governor of the State of Mississippi and Ex Officio Chairman of the State Mineral Lease Commission, and the Attorney General of the State of Mississippi and Ex Officio Secretary of the State Mineral Lease Commission, respectively, who acknowledged before me that they signed, sealed and delivered the foregoing Oil, Gas and Mineral Lease as the act and deed of said Commission for and on behalf of the State of Mississippi, on the date and for the purposes therein stated, first being duly authorized so to do.

GIVEN under my hand and official seal of office, this the 26th day of August, 1977.

Mrs. J. J. Langford
NOTARY PUBLIC

My Commission Expires:

My Commission Expires Sept. 15, 1979

My commission expires:

STATE OF MISSISSIPPI,
COUNTY OF HANCOCK

I, JOHN D. RUTHERFORD, JR., Clerk of the Chancery Court of said County, hereby certify that the foregoing instrument of writing was filed in my office for record on the 6 day of October, 1977, at 11:45 o'clock A. M., and duly recorded in Oil and Gas Lease Record Book No. 92, Page No. 575-576

WITNESS my hand and seal of said Court, this _____ day of October, 1977.

JOHN D. RUTHERFORD, JR., Chancery Clerk

By Pamela Davenport D.C.

Supreme Court, U.S.
FILED
OCT 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM, U.S., INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

BRIEF FOR PETITIONERS

EUGENE GRESSMAN
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ELIZABETH A. HARRIS
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Petroleum Company
1252 Adams Building
Bartlesville, Okla. 74004
(918) 661-6280

Counsel for Petitioners

CASELAW PRESS INC. — 1717 K STREET NW WASHINGTON DC 20036 — 223-1220

QUESTION PRESENTED

Whether, at the time of Mississippi's statehood in 1817, the lands under the non-navigable but tidally influenced inland waters were conveyed by the United States to Mississippi as part of the state-owned public trust.

PARTIES TO THE PROCEEDING BELOW

In the proceeding before the Mississippi Supreme Court, the appellants were Cinque Bambini Partnership, Carroll W. Allen, Lydia Carroll, Hamilton Allen, Harry B. Kelleher, Spooner Petroleum Company, Enserch Exploration, Inc., and Phillips Petroleum Company. Only Phillips Petroleum Company and Cinque Bambini Partnership are petitioners in this Court.

The appellees below, and the respondents in this Court, were the State of Mississippi and Saga Petroleum U.S., Inc.

RULE 28.1 LISTING

The Rule 28.1 list of parents, subsidiaries and affiliates of Phillips Petroleum Company, a petitioner herein, is contained in Appendix C of the petition for writ of certiorari, Pet. App. 75a-77a. There have been no changes in that list since the filing of the petition, except that Bissendorf Biosciences GMBH has become a subsidiary of Phillips Petroleum Company. Also, the name Alyeska Pipeline Service Company was misspelled on the original list.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-870

PHILLIPS PETROLEUM COMPANY and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM, U.S., INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

BRIEF FOR PETITIONERS

The petitioners respectfully pray that this Court, upon a full review of the facts and the arguments, reverse the judgment of the Supreme Court of Mississippi and remand the case for further proceedings consistent with this Court's judgment and opinion.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi, as modified on rehearing, is reported at 491 So.2d 508. It is reprinted in Appendix A to the petition for writ of certiorari, Pet. App. 1a-26a.

The Findings and Ruling of the Chancery Court of Hancock County, Mississippi, as well as its Final Judgment and Decree, are not officially reported. They are reprinted in Appendix B to the petition for writ of certiorari, Pet. App. 29a-74a.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on May 14, 1986, Pet. App. 27a.[1] A petition for rehearing was denied on July 30, 1986, accompanied by a modification of the original opinion of the court. Pet. App. 28a.

Following an extension of time by order of Justice White, the petition for writ of certiorari was timely filed on November 28, 1986. On February 23, 1987, the Court granted the petition. On April 6, 1987, the Court denied the motion of the respondent State of Mississippi to dismiss the writ of certiorari as improvidently granted.

The jurisdiction of this Court is invoked under 28 U.S.C §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article IV:

> "Section 3. New States may be admitted by the Congress into this Union; . . ."

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[1] In this brief, "Pet.App." references are to the appendix to the petition for writ of certiorari. References to "J.A." are to the joint appendix filed in this Court after the grant of certiorari. References to "R." are to the original record, in bound volumes, which has been certified and lodged with the Clerk of this Court.

Act of March 1, 1817, 3 Stat. 348-349:

> "Sec. 1. . . . the inhabitants of the western part of the Mississippi territory . . . hereby are authorized to form for themselves a constitution and state government . . . and the said state, when formed, shall be admitted into the union upon the same footing with the original states, in all respects whatever.
>
> * * * * *
>
> "Section 4. *And be it further enacted,* . . . that no taxes shall be imposed on lands the property of the United States, and that the river Mississippi, and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, shall be common highways, and for ever free, as well to the inhabitants of the said state, as to other citizens of the United States, without any tax, duty, impost, or toll, therefor, imposed by the said state."

Congressional Resolution of December 10, 1817, 3 Stat. 472, 473:

> "*Resolved* . . . That the state of Mississippi shall be one, and is hereby declared to be one, of the United States of America, and admitted into the union on an equal footing with the original states, in all respects whatever."

The Coastal Wetlands Protection Law, Sec. 49-27-5, Mississippi Code Annotated (Supp. 1986):

> "a) 'Coastal wetlands' means all publicly owned lands subject to the ebb and flow of the tide; which are below the watermark of ordinary high-tide; all publicly owned accretions above the watermark of ordinary high tide and all publicly

owned submerged water-bottoms below the watermark of ordinary high tide."

STATEMENT OF THE CASE

This land title dispute comes here on writ of certiorari to the Supreme Court of Mississippi. It involves a major and unprecedented federal question. At the time Mississippi entered the Union in 1817 on an equal footing with the original states, did the public trust lands conveyed by the United States to Mississippi include the lands under the tidally influenced but non-navigable inland waters? In other words, did that public trust conveyance, as a matter of federal common law, encompass what Lord Hale's 17th century manuscript, *De Jure Maris* (in Moore, A History of the Foreshore 374), described as non-navigable "little streams and rivers that are not a common passage for the king's people"?

A. The nature of the wetlands in issue

The basic underlying facts are not in dispute. Detailed findings of fact, including establishment of precise, surveyed boundaries separating the properties claimed by the State as public trust land from those claimed by the petitioners, are contained in the Findings and Ruling of the Chancery Court of Hancock County, Miss. (Pet. App. 29a-70a), and in that court's Final Judgment and Decree (Pet. App. 71a-74a). The Supreme Court of Mississippi did not purport to review or reassess the Chancery Court's factual findings. Rather, the Supreme Court addressed "the broad, general principles which must be settled before permanent surveyed or surveyable boundaries may be established." Pet. App. 26a. In one particular, not now relevant, the Supreme Court found that the Chancery

Court had misapplied those "general principles" when it held that two lakes created by dredging for highway fill material belonged to the State. Pet. App. 23a-24a. Otherwise, the case was remanded to the Chancery Court to establish the precise outer boundaries of the public trust lands as defined by the "general principles" of public trust dominion recognized by the Mississippi Supreme Court.

At the commencement of this suit in 1978, the title dispute between the State of Mississippi and the private landowners related to some 2400 upland acres of largely undeveloped agricultural land in Hancock County. The county is bounded on the south by the Mississippi Gulf Coast. The land in question generally lies some five or six miles north of the Gulf Coast, along the west bank of the Jourdan River. The Jourdan River itself flows into the Bay of St. Louis, an inlet of the Gulf of Mexico. Pet. App. 32a.

Only 42 of the 2400 acres originally in issue in this case were found by the Mississippi Supreme Court to be properly within the State's public trust domain. Those 42 acres consist of: (1) the north branch of Bayou LaCroix; (2) eleven unnamed drainage streams; and (3) the remains of Bayous Enceinte and Long Gar. The ebb and flow of the tide are discernible on these 42 acres of wetlands, at least for purposes of floating a toothpick under sail.

Bayou LaCroix eventually empties into the Jourdan River, a navigable stream. The eleven small drainage streams, which are not to be found on any ordinary map, range in size from .44 acres to 9.966 acres; the total surface area for six of the streams is less than one acre each. Pet. App. 2a. For the convenience of the Court, a portion of Exhibit P-167 is attached in the appendix to this brief, p. 1a, *infra*. Exhibit P-167, which is in the record, shows

the area in which these unnamed creeks are located, being designated C-1 through C-11.[2] These streams flow into either bayous or the Jourdan River.

Large parts of Bayous Enceinte and Long Gar were destroyed by dredging landfill for the construction of Interstate I-10. This resulted in the creation of two artificial lakes. Only the thread of these two bayous is still in issue, the court below having found that the State has no public trust claim to the artificial lakes.

Most of the wetlands in issue lie almost perfectly flat. From the earliest days, the patents or grants creating private holdings in this area made "no specific references to small streams, inlets or bayous located therein." Pet. App. 35a. There was, in other words, no attempt in these patents and grants "to except, meander or otherwise take note of the interior streams." Pet. App. 41a. The original survey lines ran straight across these waterways, making no mention or description of them. Nor do any of these wetlands constitute boundary lines for the privately owned fast lands.

Portions of the interior streams that have been found to be tidally influenced are only ankle deep or less at average or mean high tide. Exhibits S-187 through 191, R. 182-183. Some of the mean high tide boundaries of these tidally influenced wetlands consist of little more than a film of moisture around the roots of trees and grasses. Occasionally a fisherman has been seen on one or two of the streams. Pet. App. 41a.

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[2] Another map, showing the boundaries of the lands claimed by the private landowners, is attached as Exhibit "A" to the original Bill to Quiet and Confirm Title and To Cancel Title. Exhibit "A" is reproduced in the joint appendix before this Court. J.A. 27a.

Much of the acreage in question has been used over the years to raise timber, rice, clover, and soybeans. Pet. App. 41a. At one time before Interstate I-10 was built, one landowner used his land to pasture 400 head of cattle; each winter the marsh grass was burned off to provide good spring and early summer grazing for the cattle down to the water's edge. Pet. App. 41a. The cattle often grazed down to the edge of the Jourdan River and Bayou LaCroix and drank water from both the river and the bayou. Pet. App. 41a.

For over 150 years, record title to these acres, including those covered by the eleven streams and the bayous was quietly enjoyed by the private owners thereof, including the petitioners and their predecessors in interest. As the Mississippi Supreme Court noted, the petitioners and others "are vested with record title, derived from pre-statehood Spanish land grants said to date back to April 15, 1813 and to have been expressly confirmed by the Act of the Congress, and from federal and state patents." Pet. App. 2a.[3] The Mississippi Supreme Court held, however, that no recognition is to be accorded Spanish land grants after 1783, citing *Pollard's Lessee* v. *Hagan,* 44 U.S. (3 How. 212, 225 (1845), and *Henderson* v. *Poindexter,* 25 U.S. (12 Wheat.) 530, 535-36 (1827). Since these grants dated from April 15, 1813, they came too late to be recognized; and the confirming acts of Congress of March 3, 1819, May 8, 1822 and May 28, 1830 were thereby rendered "of no force and effect" as to the lands in question. Pet. App. 19a. Whatever title to wetlands the United States

[3] The Supreme Court immediately added that such historical title avails the petitioners nothing "if the lands in dispute are a part of those held by the State of Mississippi by virtue of a trust created at the time Mississippi was admitted to the Union in 1817. For all practical purposes, the case turns on whether the disputed lands are a part of the public trust." Pet.App. 2a.

may have held was said to have been "effectively and irrevocably granted to the State of Mississippi as part of its public trust on the occasion of statehood in 1817." Pet. App. 19a.

Despite the holding that the private landowners' title to these wetlands was defective, it is undisputed that these landowners "have for over 150 years paid taxes on the entire acreage in these claims and grants." Pet.App. 41a. Thus taxes were paid on the wetlands in issue. It is equally clear that at no time during those 150 or more years did the State make any claim or assert any title to these wetlands. Nor is there any indication in the record that Bayou LaCroix or the eleven drainage streams were at any time used in fact for commercial navigation, although the Chancery Court asserted that the bayous were "capable" of carrying commerce with reasonable improvements. Pet.App. 35a.

The State never exhibited any interest in these privately held wetlands prior to the enactment of the Coastal Wetlands Protection Law in 1973. Miss. Code Ann. § 49-27-1 through -69 (Supp. 1986). This statute charged the Mississippi Marine Resources Council with the task of preparing maps identifying state-owned wetlands for regulatory purposes only. Section 49-27-5 defined the term "coastal wetlands" to include "all publicly owned lands subject to the ebb and flow of the tide; which are below the watermark of ordinary high tide."

Maps were then drawn from aerial photographs, purporting to show the extent of the wetland areas. The maps were necessarily imprecise. They were not drawn for the purpose of indicating legal titles or claims to any of the wetlands. They were drawn solely for the purpose of indicating the probable scope of the state wetlands, in an-

ticipation of possible environmental protective regulations.

Nonetheless, another state agency, the Mineral Lease Commission, recognized the possibility that valuable oil and gas resources might lie beneath these wetlands. Using the maps prepared by the Marine Resource Council, the Mineral Lease Commission treated the maps as indicative of the legal boundaries of state-owned public trust wetlands. It then began to sell oil and gas leases on the wetlands thus delineated.

In 1977 the Commission leased some 600 acres of wetlands in Hancock County, the record title to which had long been thought resident in the petitioner Cinque Bambini and others, to the respondent Saga Petroleum U.S., Inc. The leases were duly recorded in the chancery clerk's office in Hancock County.

Upon learning of these oil leases, Cinque Bambini and other record title holders instituted this suit in 1978 to confirm and remove clouds from their titles. The State of Mississippi and its lessee Saga Petroleum were named as defendants. J.A. 3a. Answers and counterclaims were filed by the defendants.

After extended proceedings in the Chancery Court of Hancock County, the court entered detailed findings and conclusions. Pet.App. 29-70a. The court held that only about 141 of the 2400 acres put in issue in this suit are within the state-owned public trust. The court found two categories of tidally-influenced wetlands within those 141 acres: (1) slightly over 98 acres consist of two lakes dredged by a state contractor in the mid-1960s to obtain fill material for the construction of Interstate I-10; and (2) slightly over 42 acres consist of the north branch of Bayou

LaCroix, the eleven small drainage streams, and the threads of Bayous Enceinte and Long Gar.

The Chancery Court made its own examination of the public trust doctrine. It concluded that the doctrine recognizes that all wetlands subject to the ebb and flow of the tide are part of the public trust domain, and that Mississippi acquired such wetlands when it entered the Union in 1817. In so ruling, the Chancery Court adopted the claim of the State and Saga Petroleum that

> ". . . any part of the property over which the tide ebbs and flows, up to the mean high water line, is owned by the State under the Public Trust Doctrine – literally – regardless of whether the watercourses were commercially navigable at Mississippi's admission into the Union, regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea, and regardless of whether the water be commercially navigable even now." Pet.App. 32a.

B. The Mississippi Supreme Court Ruling

On the appeal by the private claimants, the Mississippi Supreme Court affirmed the Chancery Court's ruling in part and reversed in part. Specifically, the Supreme Court held:

(1) The two artifically created lake tidelands, created out of the former two bayous, do not belong to the State to the extent the lakes were not naturally within the tidal flow when dredging began. To strip those wetlands from the private record title holders would constitute an uncompensated taking in violation of both the federal and state constitutions. Pet. App. 23a-24a.

(2) The remaining 42 acres covered by the north branch of Bayou LaCroix and the eleven drainage streams, being tidally influenced in 1817 even though non-navigable, are within the public trust of Mississippi. See Pet.App. 2a, 15a. Such lands were effectively and irrevocably granted to the State on the occasion of statehood in 1817. The Supreme Court accordingly remanded the proceeding to the Chancery Court to establish more precise outer boundaries of these public trust wetlands. Pet. App. 26a.

In so ruling, the Mississippi Supreme Court addressed and relied upon what it conceived to be the decisive point of federal law[4] – "whether at the time of statehood tidally influenced non-navigable waters were included in the state owned public trust." Pet.App.9a. The court acknowledged that all parties before it had addressed that federal question. The private claimants, said the court, had argued that, while early federal cases had referred to public trust land as including all lands within the "ebb and flow of the tide," subsequent decisions of this Court, beginning with *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842), had translated the "ebb and flow" concept into a "navigable waters" concept. According to this argument, the state owned public trust included "only those waters navigable in fact in 1817, tidal influence being essentially irrelevant." Pet App. 8a. The State, on the other hand, argued that, "in addition to such navigable waters, the trust also includes all lands subject to the ebb and flow of the tide in 1817 and below the then mean high water mark." Pet.App. 8a-9a.

The Mississippi court could find "no federal case expressly deciding this point of federal law." Pet.App. 9a. It

[4] The court stated that "the question of what lands are given to the State in trust is necessarily a question of federal law." Pet.App. 7a-8a.

accordingly fashioned its own principle that, "as a matter of federal law, the United States granted to this State in 1817 all lands subject to the ebb and flow of the tide and up to the then mean high water level, without regard to navigability." Pet.App. 10a. In the course of marking the public trust boundaries by the tidal high water mark, the court referred to the physical fact that even navigable streams and channels contain some non-navigable parts, particularly near the shorelines. So, for purposes of dealing with tidally influenced waters, the court tried to equate the navigability-in-fact test with the ebb-and-flow test by creating a novel "toothpick" test, i.e.,

> ". . . so long as by unbroken water course — when the level of the water is at mean high water mark — one may hoist a sail upon a toothpick and without interruption navigate from the navigable channel/area to land, always afloat, the waters traversed and the lands beneath them are within the inland boundaries we consider the United States set for the properties granted the State in trust." Pet.App. 12a.

By way of summary, the Supreme Court expressed its understanding of federal law to be that, effective upon statehood on March 1, 1817, the United States granted to the State of Mississippi in trust all lands, to which the United States then held title (including their mineral and other subsurface minerals), subject to the ebb and flow of the tide below the then mean high water level

> "regardless of whether the water courses were commercially navigable at the time of Mississippi's admission into the Union, regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea. Similarly granted were the

> beds and streams of all non-tidal waters which were navigable in fact in 1817. This act of creation consummated, the federal soverign rested." Pet. App. 15a.

The court accordingly concluded that the 42 acres covered by the north branch of Bayou LaCroix and the eleven drainage streams, even if considered to be non-navigable except by a toothpick propelled by the tide, were part of the public trust conveyed by the United States to Mississippi in 1817. The fee simple titles stemming from the Spanish land grants and from the confirming Acts of Congress were thus held to be without force or effect as to the lands in issue.

The decision below means that the State is free to execute oil, gas and mineral leass to such companies as the respondent Saga Petroleum. Saga would then be free to drill into the wetlands below the mean high water mark, "regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea." Pet.App. 15a. And regardless of the fact that these wetlands, often tiny in scope, lie in the midst of privately owned fast lands.

SUMMARY OF ARGUMENT

The single question in this case is: What was the scope and nature of the public trust wetlands that Mississippi acquired upon its admission to the Union in 1817?

The answer given by the Supreme Court of Mississippi is: In 1817 Mississippi acquired title not only to the soil beneath navigable waters but also to the soil beneath non-navigable waters that are subject to the ebb and flow of the tide.

In declaring public trust ownership over non-navigable but tidally influenced wetlands, the Mississippi court extended such ownership to the farthest reach conceivable. Title attaches in such a case "regardless of whether the water courses were commercially navigable at the time of Mississippi's admission into the Union, regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea." Pet. App. 15a.

No federal precedent exists for extending the public trust doctrine, or its companion equal footing doctrine, to cover such non-navigable wetlands. Such an extension misconceives the nature and the policy of both doctrines, and from at least three perspectives.

1. To the extent that the doctrines are rooted in the common law, English courts and writers never ascribed to the Crown any kind of soverign ownership over non-navigable wetlands. Private ownership was recognized as to such wetlands, even though they might be tidally influenced.

2. The same dichotomy between publicly owned navigable wetlands and privately owned non-navigable wetlands can be found in the common law of the original 13 states. Out of that law sprang the equal footing doctrine with respect to the ownership of lands beneath navigable rivers and streams.

3. The decisions of this Court that deal with the public trust and equal footing doctrines have uniformly treated lands under navigable waters as belonging to the public, while lands under non-navigable waters are subject to private ownership.

It is not surprising, therefore, that the Mississippi court

could find no federal precedent for rewriting and extending the public trust and equal footing doctrines in this fashion. Navigability in fact has become the *sine qua non* of the public trust doctrine. To add non-navigable wetlands to that doctrine at this late date is contrary to both the history and the policy of the doctrine. And when the expanded doctrine is created and applied more than 150 years after statehood, the doctrine can create inordinate disturbances in land titles and other commercial relationships, to say nothing of creating inequality in footing.

The time has come for this Court to reiterate once more that both the federal public trust doctrine and the federal equal footing doctrine encompass only those lands beneath the navigable waters of the respective states.

ARGUMENT

The Supreme Court of Mississippi has stretched the public trust doctrine beyond recognition. That court has done more than extend the doctrine to non-navigable tidal waters. It has extended the state public trust domain to the farthest conceivable reaches of the tidal ebb and flow, regardless of the commercial navigability of the water courses and "regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea." Pet. App. 15a; and see Pet. App. 12a.

Such radical revision of the body of the public trust doctrine is unprecedented. There is no case in early common law that recognizes public or royal ownership of lands beneath non navigable waters, whether or not tidally influenced. There is no such case in the common law of the

original 13 states. There is no such case in this Court's jurisprudence. And there is no precedent whatever for extending "ebb and flow" ownership beyond the shoreline of navigable waters and to the farthest inland reaches of the tide regardless of how insignificant the tidal influence, or how shallow the water."

The fact that Mississippi waited more than 150 years before asserting an interest in its non-navigable but tidally influenced wetlands strongly suggests that in 1817 no one, least of all the State of Mississippi, had reason to believe that the equal footing or the public trust doctrine required that lands under such non-navigable waters be kept in trust for the use of the public. See *Morgan v. Reading*, 11 Miss. (3 S.&M.) 366, 385-388 (1844).

As this Court has repeatedly said, it is "the ownership of land under navigable waters [that] is an incident of sovereignty" and it is only such lands that the Federal Government holds "in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an 'equal footing' with the established States." *Montana v. United States,* 450 U.S. 544, 551 (1981).[5]

We turn, then, to the historical and jurisprudential errors that mark the effort below to discover, in the name of federal law, "the boundaries of the properties granted the State of Mississippi in trust in the year 1817." Pet. App. 8a.

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[5] See also *United States v. Cherokee Nation of Oklahoma,* No. 85-1940, 107 S.Ct. 1487, 1492 (March 31, 1987), where the Court, quoting from *Martin v. Waddell,* 41 U.S. (16 Pet.) 367, 410 (1842), noted that "the sovereign States gain 'the absolute right to *all their navigable waters and the soils under them* for their own common use' by operation of the equal footing doctrine." (Emphasis added).

1. Predicating Public Ownership of Wetland Solely on Tidal Ebb and Flow Misconceives the Common Law Roots of the Public Trust Doctrine.

The Mississippi court uses the tidal ebb and flow as a basis for concluding that the public trust doctrine in 1817 applied to non-navigable streams. Such use of the ebb and flow concept confounds the history and policy of the doctrine. It also revives an ancient controversy over the "tidewater" ingredient of the English common law, a controversy that this Court long ago put to rest.

Early on, English courts and writers frequently spoke of "tidewaters" or "ebb and flow" as a measure both of the King's ownership of underwater lands and of English admiralty jurisdiction. But close analysis of the English law makes clear that such "tidewater" or "ebb and flow" references were really synonyms for "navigable waters." As explained by Chief Justice Taney in *The Propeller Geneseè Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 454-55 (1851), the English reliance on the "tidewater" concept

> . . .was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore, tide-water and navigable water are synonymous terms, and tide-water, with a few small and unimportant exceptions, means nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the ad-

> miralty jurisdiction is confined to the ebb and flow of the tide. *In other words, it is confined to public navigable waters.* (Emphasis added).

This common law marriage between the term "tidewaters" or "ebb and flow" and the term "navigable waters" has been noted many times by this Court. *See, e.g., Illinois Central Railroad v. Illinois,* 146 U.S. 387, 436 (1892); *Packer v. Bird,* 137 U.S. 661, 667 (1891); *Barney v. Keokuk,* 94 U.S. 324, 337 (1876); *Jackson v. Steamboat Magnolia,* 61 U.S. (20 How.) 296, 299 (1857); and see *Donnelly v. United States,* 228 U.S. 243, 261 (1913). However, as *Genesee Chief* noted, the "tidewater" description that was often applied to English navigable streams is confusing and "utterly inadmissible" in the United States. 53 U.S. (12 How.) at 457. In this country, we have "thousands of miles of public navigable water, including lakes and rivers [in interior states] in which there is no tide." *Id.* The generic common law term, "navigable waters," is a more accurate description of public waterways in the United States. *Genesee Chief* was thus able to conclude that admiralty jurisdiction

> . . .is here made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable it was deemed to be public; and if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution.[6]

Id. at 457.

[6] *Genesee Chief* accordingly overruled *The Thomas Jefferson,* 23 U.S. (10 Wheat.) 428, 429 (1825); and *Waring v. Clarke,* 46 U.S. (5 How.) 441, 463-64 (1847). The Court in those cases had read the English references to "ebb and flow" as limiting admiralty jurisdiction to tidal waters. While conceding that the ebb and flow might limit the English admiralty jurisdiction, the *Genesee Chief* Court felt such a limitation totally misconceived the nature of the American continent.

Several lessons are to be drawn from the English common law regarding tidal ebb and flow:

1. The "tidewater" or "ebb and flow" terminology was often used interchangeably with "navigable waters" to refer to the public waterways of England, nearly all of which were navigable and also subject to the ebb and flow of the tide.[7] Such tidal description, as we have just seen, has been deemed "utterly inadmissible" in describing public ownership of waterways in the United States.

2. The "tidewater" or "ebb and flow" terminology was not meant to convey the notion that the mere presence of tidal influence in and of itself makes a waterway navigable. As Lord Mansfield wrote in *Mayor of Lynn v. Turner*, 1 Cowp. 86, 98 Eng. Rep. 980, 981 (K.B. 1774):

> *Ex facto oritur just* [out of the fact arises the law]. How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so; for there are many places into which the tide flows that are not navigable rivers; and the place in question may be a creek in their own private estate.

See also *The King v. Montague*, 4 B.&C. 598, 602, 107 Eng. Rep. 1183, 1184 (K.B. 1825), where, in reliance on Lord Mansfield's remarks, Bayley, J. stated that "it does not necessarily follow, because the tide flows and reflows

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[7] In *Mayor of Colchester v. Brooke*, 7 Q.B. 339, 373, 115 Eng. Rep. 518, 531 (1845), Lord Denman, C.J., wrote: "It cannot be disputed that the channel of a public navigable river is properly described as a common highway . . . and there is no one circumstance which more decisively affixes on a river the character of being public and navigable in this sense of a highway than the flow and reflow of the tide in it."

in any particular place, that it is therefore a public navigation, although of sufficient size."[8]

3. The English common law recognized that the Crown's ownership of underwater lands was limited to the territorial seabed and the soil underlying arms of the sea, including navigable tidal rivers up to the ordinary high tide mark.[9]

4. Finally, English common law teaches that the Crown has no sovereign dominion as to lands under non-navigable waters. Such lands were invariably deemed subject to private ownership. No less an authority than Lord Hale, in his noted treatise *De Jure Maris*, reprinted in S.A. Moore, A History of the Foreshore, pt. 1 at 374 (1888), declared:

> There be some streams or rivers, that are private not only in propriety or ownership, but also in use, as little streams and rivers that are not a common passage for the king's people.

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[8] In *Miles v. Rose*, 5 Taunt. 705, 1 Marsh. 313, 128 Eng. Rep. 868 (C.P. 1814), Bayley, J. wrote that the flowing of the tide is not "absolutely inconsistent with a right of private property in the creek," although it creates a "strong prima facie evidence" of the creek being a public navigable river. See also S.A. and H.S. Moore, History of Law and Fisheries 166-167 (1903): "The mere fact of the presence of the tidal influence does not of itself make a place navigable . . . [i]t must therefore be a question of evidence in every case whether a particular part of any tidal water is or is not navigable."

[9] See *Le Roy v. Trinity House*, 1 Sid. 86, 82 Eng. Rep. 986 (K.B. 1662) (recognizing the Crown's original ownership of lands submerged under "tidal navigable rivers"); *Rex v. Smith*, 2 Doug. 441, 99 Eng. Rep. 283 (K.B. 1790) (recognizing Crown ownership of lands under a "navigable river"). The modern English rule is the same, restricting Crown ownership to lands under "all navigable rivers where the tide flows and reflows." *Gann v. Free Fishers of Whitstable*, 11 H.L.C. 192, 207; 110 Eng. Rep. 1305 (1865); *Malcomson v. O'Dea*, 10 H.L.C. 593, 618; 11 Eng. Rep. 1155 &$863).

> Again, there be other rivers, as well fresh as salt, that are of common or publick use for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are *prima facie publici juris,* common highways for man or goods or both from one inland town to another.

In that 17th century statement, Lord Hale made no distinction between tidal or non-tidal waters. "[L]ittle streams and rivers that are not a common passage" were considered private property, regardless of tidal influence. These non-navigable little streams – like the eleven small drainage streams in the instant case – were outside the realm of Crown ownership.[10]

English case law has consistently followed the rule enunciated by Lord Hale, whose treatise appeared soon after the 1604 decision in *The Case of the Royal Fisheries of the Banne,* Davies' Rep. 149, reprinted in J. Angell, Tidewaters 35 (appendix) (1826). At issue were the title and fishing rights in the Banne River at a point where it was tidally influenced. As there stated:

> There are two kinds of rivers; navigable and not navigable. Every navigable river, so high as the sea flows and ebbs in it, is a royal river, and the fishery of it is a royal fishery, and belongs to the king by his prerogative; but in every other

[10] One noted authority, in discussing Lord Hale's treatise, declared: "In all this discussion there is no such distinction as navigable and non-navigable as depending on the flow of the tide. All rivers are *publici juris* which are capable of being navigated, and whenever Lord Hale wishes to make a distinction depending on tide water, he always says navigable waters where the tide ebbs and flows, thereby plainly indicating that he did not consider it sufficient to refer to tidal water by the word navigable only." H. Farnham, The Law of the Waters and Water Rights, Vol. 1, p. 114 (1904).

> river not navigable, and in the fishery of such river, the ter-tenants on each side have an interest of common right. The reason for which the king hath an interest in such navigable river, so high as the sea flows and ebbs in it, is because such river participates of the nature of the sea, and is said to be a branch of the sea so far as it flows. . .

The *Banne* case does not say that only tidal rivers are navigable. Rather, it clearly distinguishes between navigable and non-navigable rivers, ascribing royal ownership to the former and private riparian ownership to the latter. Subsequent English cases are consistent with this dichotomy. *See e.g., Pierse v. Fauconberg*, I Burr. 292, 97 Eng. Rep. 320 (1757); *Rex v. Smith,* 2 Dougl. 441, 99 Eng. Rep. 283 (K.B. 1790); *Miles v. Rose,* 5 Taunt. 705, 128 Eng. Rep. 868 (C.P. 1814); *Rex v. Montague,* 4 B. & C. 599, 107 Eng. Rep. 1183 (K.B. 1825). As for ownership of non-navigable tidally influenced rivers, the only English case to discuss the issue from the time of Lord Hale until Mississippi achieved statehood was *The Mayor of Lynn v. Turner, supra,* wherein Lord Mansfield reiterated the common law rule that non-navigable tidal rivers are privately owned.

In sum, no English case has held that royal dominion extends to non-navigable tidal rivers. On the contrary, English courts and commentators alike have recognized that *"[i]n many small creeks and inlets of the sea private property may exist."* J.M. Gould, A Treatise on the Law of Waters, 97 (1883) (Emphasis added). The presence of the tide was merely an evidentiary presumption at best, capable of being rebutted by evidence of non-navigability. *Miles v. Rose, supra; Rex v. Montague, supra.* As Gould summed up the English common law, *Id.:*

> If the channel is broad and deep and adapted to the purposes of commerce, it is a natural con-

> clusion that it is a public navigation; but if it is a small creek, navigable only at exception and extraordinary tides, or at certain states of the tide, and then only for a short time and by very small boats, its inadaptibility for general use is strong, if not conclusive, evidence against the existence of a public right.

Thus, to the extent that the State of Mississippi or any of the original 13 states borrowed English common law as to ownership of non-navigable tidal streams, the rule adopted must have been one of private ownership. If the public trust is to be predicated on the common law, the Mississippi Supreme Court's historical reliance on the "ebb and flow" test must succumb to the actual navigability test evidenced by the English cases. See MacGrady, The Navigability Concept in Civil and Common Law, 3 Fla.St.L. Rev. 511, 545-587 (1975).

II. None of the Original 13 States Considered Their Public Trust Domain to Extend to the Soil Under Non-Navigable Waters Whether or Not Tidal.

The 13 original states are the divining rods of the equal footing doctrine. But none of those states, prior to 1817 made any definitive claim to public ownership to the soil under non-navigable waters. No public ownership claim was made by these states that exceeded what was asserted by the English Crown.

It being clear "that the navigable waters of England, and the soils under them, [were] held by the crown," *Martin v. Waddell,* 41 U.S. at 413-414, the same sovereign right to the soils under the navigable streams passed to the newly formed states upon their attaining independence from England. As the *Martin* opinion explained, *Id.* at 410:

> For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.

Each new state, upon entering the Union, acquires only those incidents of sovereignty that the original 13 states enjoyed when they formed the Union. The only incident of sovereignty respecting underwater lands that was universally recognized related to land under navigable waters, an incident borrowed from the English common law. See *Montana v. United States*, 450 U.S. at 551.

But there is no indication that any of the 13 states ever asserted dominion over the land beneath non-navigable streams and creeks, particularly those that are remote from the seacoast, simply because such waters are tidally influenced. Only two state court cases addressed the navigability issue prior to 1817, the year Mississippi joined the Union, and neither case supports the claim advanced in this case by Mississippi. Those two cases dealt only with the question whether navigable waters are restricted to tidally influenced waters.

In *Palmer v. Mulligan*, 3 Caines 307 (N.Y.S.Ct.105) Chancellor Kent, holding that the non-tidal part of the Hudson river was privately owned, misread English precedent to mean that non-tidal waters are not legally navigable; only tidal waters are legally navigable. That proposition is quite inapplicable to the geography of the United States, where many non-tidal rivers are navigable in fact. Most other American courts have repudiated

Chancellor Kent's view of the common law.[11] Indeed, *Palmer v. Mulligan* was later discredited in New York. See, *People v. Canal Appraisers,* 33 N.Y. 472 (1865), which rejected the doctrine that "all rivers above the ebb and flow of the tide, whether they are in fact navigable or not, belong to the land owners on each side, *usque ad filum adquae*." And see *Hooker v. Cummings*, 20 Johns 90, 11 Am. Dec. 249 (N.Y.S.Ct.1822), a New York court held that "navigability in fact is now regarded as the test of navigability in law."

The only other pre-1817 state court decision was *Carson v. Blazer*, 2 Binney 475 (Pa. 1810). The Pennsylvania court there held that title to the bed of the Susquehanna River remained in the Commonweath since the river was a public navigable river even above the flow of the tide. In the words of the Pennsylvania court, *Id.* at 467,

> The qualities of fresh or salt water cannot, amongst us, determine whether a river shall be deemed navigable or not. Neither can the flux or reflux of the tides ascertain its character.

Thus, even during the pre-1817 period, the ebb and flow test of navigability had a very short tenure. The one state that adopted it, New York, later repudiated it. Subsequent courts in some of the other original states repudiated the "tidality means navigability" notion out of hand, particularly the courts in Massachusetts and Connecticut.

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[11] Writing about Kent's doctrine's that in England, navigability was determined by the tidal flow, Farnham states that "[i]n fact the doctrine seems to have been taken for granted without much attempt to investigate the correctness of it, and to have have been stated as a premise from which to argue that the rule was not applicable in this country." *supra,* n. 10, at 106. Farnham documents the American rejection of tidal ebb and flow as a determinant of navigability with citations to several dozen cases from various state and federal courts. *Id.*

In Massachusetts in 1822, Chief Justice Parker flatly rejected the notion that "the property of the sovereign. . .extend[s] to all places where the tide ebbs and flows, whether such places are navigable or not." *Commonwealth v. Charleston,* 18 Mass. (1 Pick.) 179 (1822). He further wrote that in this country public property is confined to what may be of public use, so that

> in many little creeks into which salt water flows, but which are incapable of being navigated at all, private property may be maintained. This is undoubtedly the case with many of the creeks which run through our extensive marshes.

Id., at 186.

No doubt, Chief Justice Parker was stating what was commonly assumed in 1822, i.e., that "little creeks into which the salt water [tide] flows" are "undoubtedly" private property.

A few years later, Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts reiterated the sentiments of his predecessor. In considering a case involving a bridge over a small tidal creek that was said to obstruct navigation thereon, *Rowe v. Granite Bridge Corp.*, 38 Mass. (21 Pick.) 344, 347 (1838), Chief Justice Shaw said that:

> . . .it is not every ditch, in which the salt water ebbs and flows, through the extensive salt marshes along the coast and which serve to admit and drain off the salt water from the marshes, which can be considered a navigable stream. Nor is it every small creek in which a fishing skiff or gunning canoe can be made to float, at high water, which is deemed navigable. But in order

> to have this character, it must be navigable to some purpose, useful to trade or agriculture.[12]

Similar views were expressed by Justice Ellsworth of the Connecticut Supreme Court of Errors. Thus in *Groton v. Hurlburt*, 22 Conn. 177, 185 (1852), Justice Ellsworth quoted approvingly the above remarks of Chief Justice Shaw in *Rowe*. More importantly, Justice Ellsworth expanded on his view of the lack of public navigability concern with respect to small streams and coves. In *Wethersfield v. Humphrey,* 20 Conn. 218, 27 (1850), he wrote that a small "cove" cannot be said to be "navigable" simply because at times "a fish-boat, or skiff, or indian canoe may be pushed through its waters. . . .those only are navigable waters, where the public pass and repass upon them, with vessels or boats, in the prosecution of useful occupations." Any argument to the effect that all tidal streams are navigable and thus could not be obstructed without governmental sanction was termed "preposterous," for it

> . . .would convert numerous bridges over private rivers and inlets on the margin of Long Island Sound, into unconstitutional obstructions and public nuisances. . . .Such a doctrine has not been received, and never can receive, the sanction of any court of justice.

What we see, then, is a confluence of English common law doctrine and the doctrine of the original 13 states. Both doctrines agree that small inland waters, not commercially navigable, are not converted into navigability by virtue of tidal influence; and they are agreed that such non-navigable waters are subject to private ownership.

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[12] Cf. the statement of the Mississippi Supreme Court in the instant case that it is enough if "one may hoist a sail upon a toothpick and without interruption navigate from the navigable channel/area to land." Pet.App. 12a.

The following is a list of the kinds of waters that the English and early American courts and writers considered non-navigable even though tidally influenced:

England, per Lord Hale	"little streams and rivers"
England, per Lord Mansfield	"a creek in their own private estate"
Massachusetts, per Chief Justice Parker	"little creeks into which the salt water flows"
Massachusetts, per Chief Justice Shaw	"every ditch, in which the salt water ebbs and flows"
Connecticut, per Justice Ellsworth	"coves" and "private rivers and inlets"

Courts in states other than the original 13 have expressed similar sentiments. See, e.g., *McManus v. Carmichael*, 3 Iowa 1 (1856), where Justice Woodward wrote that there are "many waters where the tide flows [that] are not in fact navigable, and many where it does not flow are so. It is navigability in fact which forms the foundation for navigability in law."[13]

As one commentator has put it, the early American perception of the common law "was that the beds of the tidal, navigable waters were owned by the King in his sovereign capacity and, at least since the Magna Carta, held in trust for the people. In its initial form, then, the public trust developed in this country as an adjunct of the ownership of the beds of the navigable waters, an attribute

[13] The *McManus* case was cited with approval in *Barney v. Keokuk*, 94 U.S. 324, 336 (1876), which surveys the common law of several states respecting the ownership of lands submerged under navigable waters. A more comprehensive survey was made in *Shively v. Bowlby*, 152 U.S. 1 (1894).

of sovereignty inalienable in nature." Stevens, The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right, 14 U.C. Davis L. Rev. 195, 200 (1980). It was precisely that attribute of sovereignty that Chief Justice Taney carried forward into the federal doctrine of public trust ownership. *Martin* v. *Waddell,* 41 U.S. (16 Pet.) 367, 410 (1842).

But, to repeat, the ownership of the small non-navigable streams and ditches never was considered an attribute of sovereignty at common law, here or in England. Conceptually and practically, it never became a part of the public trust. The ownership of what Lord Hale called the "little streams and rivers" remains today where it was at common law – in the hands of private landowners. It follows that Mississippi's public trust claim to the bayous and drainage streams involved in this case must fail.

III. This Court Has Never Recognized That States Have Public Trust or Equal Footing Dominion Over Lands Under Non-Navigable But Tidally Influenced Waters.

Mississippi's claim before this Court fares no better from the perspective of the Court's jurisprudence respecting the public trust doctrine and the equal footing doctrine. Both doctrines are concerned only with lands submerged under navigable waters, whether or not those waters be tidally influenced. There is no precedent, as the Mississippi Supreme Court was forced to concede (Pet. App. 9a), for invoking either doctrine solely in terms of the tidal ebb and flow, without regard to navigability in fact.

A. The public trust doctrine

The federal "public trust doctrine" was born in 1842, mothered by this Court's decision in *Martin* v. *Waddell,* 41

U.S. (16 Pet.) 367 (1842). The question there was whether New Jersey or the riparian proprietor held title to submerged beds under "the navigable waters of the Raritan river and bay" in New Jersey, "where the tide ebbs and flows." *Id.* at 407. Speaking through Chief Justice Taney, the Court declared that at common law the "dominion and property in navigable waters, and in the lands under them, [were] held by the king as a public trust." *Id.* at 411.[14] The Court then declared that the 13 original colonies or states, following the Revolution, held "all their navigable waters and the soils under them for their own common use." *Id.* at 410. New Jersey was thus held entitled to ownership of these navigable wetlands.

Three years later, in *Pollard's Lessee* v. *Hagan,* 44 U.S. (3 How.) 212 (184), a case arising out of Alabama, the Court extended and applied the public trust doctrine to all states subsequently admitted to the Union. The theory expressed was that, during pre-statehood periods when lands were held on a territorial basis, the Federal Government held all lands beneath navigable waters and the shores thereof in trust for the future states. Upon admission, each new state – to maintain its equal footing with the

[14] *Martin v. Waddell* strictly applies only to the original 13 states, New Jersey being one of them. Chief Justice Taney did cite one early New Jersey case, *Arnold v. Mundy,* 6 N.J.L. 1 (N.J.S.Ct. 1821), which has been said to be the main source of Taney's public trust doctrine. MacGrady, The Navigability Concept in the Civil and Common Law, 3 Fla.St. U.L. Rev. 511, 590-591 (1975). *Arnold v. Mundy* declared the law of public trust basically as we know it today. It declared that rights in the beds of navigable streams had been held by the Crown in trust for the common use of the people, that the states succeeded to this trust, and that a grant purporting to divest the citizens of these common rights was void. Stevens, The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right, 14 U.C. Davis L.Rev. 195, 199-200 (1980).

original 13 states – was deemed to have received such trust property from the United States, the trustee.[15] See, generally, *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-76 (1977).

Navigability is the *sine qua non* of the public trust doctrine. There are, to be sure, various definitions of navigability, dependent upon whether the problem arises in the context of the extent of admiralty jurisdiction, the regulation of navigable waters under the Commerce Clause, or the ownership of submerged lands. *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1975).[16] The Court's seminal definition of "navigable waters" was articulated in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), an admiralty case. The Court there decreed:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel over water.

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[15] The same description of the doctrine is found in *Block v. North Dakota*, 461 U.S. 273, 277 (1983); *Montana v. United States*, 450 U.S. 544, 551 (1981); *Utah v. United States*, 403 U.S. 9, 10 (1971); *United States v. Holt State Bank*, 270 U.S. 49, 54-55 (1926); *Oklahoma v. Texas*, 258 U.S. 574, 583 (1922); *Shively v. Bowlby*, 152 U.S. 1, 26-27 (1894); *Illinois Central Railroad Co. v. Illinois*, 145 U.S. 387, 434-435 (1892).

[16] "Navigable water" subject to federal admiralty jurisdiction was defined as including waters that are navigable in fact in *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1852). The definition for purposes of exerting federal power may often be more expansive. *United States v. Appalachian Power Co.*, 311 U.S. 377, 426-27 (1940).

Although *The Daniel Ball* was an admiralty case, the Court has adopted this "navigable in fact" definition as the basic federal test to locate those submerged lands to which the states hold sovereign title under the public trust doctrine. *The Daniel Ball* test of navigability in fact was first brought into the public trust arena in *Packer v. Bird*, 137 U.S. 661 (1891). Justice Field there compared American and English geography, noting that the ebb and flow test was used in England because only tidal rivers were, in fact, navigable. Applying the *Daniel Ball* navigability in fact test to non-tidal rivers, Justice Field said:

> The same reasons, therefore, exist in this country for the exclusion of the right of private ownership over the soil under navigable waters when they are susceptible of being used as highways of commerce in the ordinary modes of trade and travel on water, as when their navigability is determined by the tidal test. *It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or the soils under them.*
>
> *Id.*, at 667 (Emphasis added).

The Mississippi court's application of the tidal test to non-navigable bayous and drainage ditches is wholly in conflict with the essential purpose of the public trust doctrine, as stated by this Court in *Packer*. Public ownership of tidelands is predicated upon their significance as highways for commerce. Seen in this light, it becomes obvious why the navigability in fact test must be applied consistently to exclude non-navigable streams, creeks, ditches and bayous from the public trust. Drainage ditches that lie wholly within the bounds of private property, such as

those involved in the instant case, simply have no significance at all as "highways of commerce."[17]

Packer was the only first of the public trust cases to apply the navigability in fact test. Two years after *Packer, Shively* v. *Bowlby,* 152 U.S. 1 (1893), upheld a title claim to navigable tidewaters based on a grant from the State of Oregon, as against a patent from the United States.[18] Later, commenting on the *Shively* case, the Court in *McGilvra v. Ross,* 215 U.S. 70, 78 (1909), declared:

> And the term "navigable waters," as there used [in *Shively*], meant waters which were navigable in fact. The definition was not inadvrtent or unnecessary. It was that to which the reasoning conducted and which became the test of the dominion over shore lands and the rights which they had or could convey.

Thus the test of state dominion over public trust wetlands is navigability in fact. This is equally true whether the lands are tidal, as in *Shively,* or non-tidal as in *McGilvra.* For the policy reasons announced by the Court in *Packer,* namely the public interest in commercial navigation, the navigability in fact test is "not inadvertent or unnecessary.," It is that to which the reasoning conducts, whether the lands at issue be tidal or upland, navigable or wholly non-navigable.

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[17] In the eyes of the Mississippi Supreme Court, the public trust domain includes lands under non-navigable waters "regardless of whether the water courses were commercially navigable at the time of Mississippi's admission into the Union." Pet. App. 15a. The court does not even require that those water courses have been "susceptible" to navigation "for commerce," as *The Daniel Ball* Court insisted they must be in order to be considered navigable.

[18] The Court held that the United States did not convey title to navigable waters, since it held those lands in trust for the states. *Id.*

For this reason, *McGilvra,* 215 U.S. at 78, categorically rejected the "ebb and flow" test, declaring that "the test of navigability of wateres insisted on [ebb and flow] has had no place in American jurisprudence since the decision in the case of *The Propeller Genesee Chief v. Fitzhugh,* 12 How. 443, and is therefore no test of riparian ownership." In fact, the ebb and flow test never did have any place in determining state ownership of public trust lands even before *Genesee Chief.*

In the final analysis, the decision below is at war with the unbroken line of cases in this Court rejecting tidal ebb and flow, and establishing navigability as the essential predicate of the public trust doctrine.[19] It remains for the Court to reject Mississippi's argument that the tidal ebb and flow is an alternative and independent measure of that state's public trust domain. Such has never been the law; such should never be the law.

B. The equal footing doctrine

Mississippi's claim to these non-navigable but tidally influenced wetlands fares no better under the equal footing doctrine than it does under the public trust doctrine. Both

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[19] Some cases speak of this doctrine in terms of "shore lands," "tidelands" or "tidewaters." E.g., *Shively v. Bowlby,* 152 U.S. 1, 49, 57 (1894); *Knight v. U.S. Land Association,* 142 U.S. 161, 183 (1891). But such "tideland" references, apart from reflecting some of the confusion stemming from the common law heritage, are usually made in a coastwise setting in the course of defining "the geographical, chemical, and enviromental limtis of the three oceans and the gulf that wash our shores . . . bodies of water [that] in the main are navigable." *Kaiser Aetna v. United States,* 444 U.S. 164, 183 (1979) (Blackmun, J., dissenting). This Court has never used "tidelands," "shore lands," or "tidewaters" to refer to a body of water, or the soil underneath, that is not an integral part of a navigable ocean or lake.

concepts recognize only those wetlands that are navigable in nature, or, more precisely, those that are navigable in fact.

These two doctrines spring from the same source, i.e., the lands under navigable waters that were first held by the United States or the first 13 states thereof in trust for the people. As was said in *County of St. Clair* v. *Lovingston*, 90 U.S. (23 Wall.) 46, 68 (1874),

> By the American revolution the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively. And new States have the same rights of sovereignty and jurisdiction over this subject as the original ones.

Or, as repeated in *Scott* v. *Lattig*, 227 U.S. 229, 243 (1913), "each new State, upon its admission to the Union, becomes endowed with the same rights and powers in this regard [soverign ownership of lands underlying navigable waters] as the older ones." See also *Block* v. *North Dakota*, 461 U.S. 273, 277 (1983); *Illinois Central Railroad* v. *Illinois*, 146 U.S. 387, 434 (1892); *Barney* v. *Keokuk*, 94 U.S. 324, 338 (1876).

As we have seen, none of the original 13 states ever established a common law or public trust proprietorship over the lands beneath the non-navigable little streams and creeks. They borrowed from the common law no more than the concept of Crown ownership of the navigable streams and the lands beneath them. Thus, under the equal footing doctrine first enunciated in *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212, 230 (1845), a state like Mississippi —

upon its admission to the Union in 1817 – could acquire only "the same property interests in submerged lands as was enjoyed by the Thirteen Original States as successors to the British Crown." *Utah* v. *United States*, 403 U.S. 9, 10 (1971). Mississippi could acquire no more or no less than what the original states had acquired in their sovereign capacity. And since the original states had no sovereignty over the lands beneath non-navigable streams, Mississippi could acquire no sovereign rights thereto upon achieving statehood.

To recognize that Mississippi in 1817 acquired dominion of the soils underlying the tiny little streams and bayous in this case would do violence to common sense as well as the equal footing doctrine. It would be contrary to the congressional resolution that admitted Mississippi "into the union on an equal footing with the original states, in all respects whatever." 3 Stat. 472, 473 (Dec. 10, 1817). In short, it would give Mississippi an unequal and therefore an unconstitutional footing.

Such a result, moreover, would implicate the taking provision of the Fifth Amendment, for the soil under these non-navigable waters has long been held by private owners, even before 1817 and certainly ever since. These are lands that even ancient common law recognized as susceptible to private ownership. Private property cannot be taken by a state, at least without paying just compensation, on a mistaken assumption that the property was somehow acquired by the state at the time of statehood. *See* Pet. App. 24a.

As was said by Justice Clark of the Supreme Court of California, dissenting and concurring in a closely similar situation, *State* v. *Superior Court of Lake County*, 172 Cal. Rptr. 696, 713, 625 P.2d 239, 256 (1981), "To impose the trust at this late date [130 years later] on all property

within the shorezone so that the state may take it without payment is confiscation and constitutionally impermissible." See also Justice Clark's dissent in the companion case, *State* v. *Superior Court of Placer County,* 172 Cal. Rptr. 713, 719, 625 P.2d 256, 262-63 (1981).

IV. The Position Here Advanced by the State of Mississippi Would Result in an Inequitable and Retroactive Adjustment of Countless Land Titles.

The impact of the decision below upon the private owners of the underwater land in question, as well as all others who have dealt with them in good faith, is too obvious to require elaboration. Property has been transferred and inherited, taxes have been paid, and various other kinds of property expectations and interests have matured since Mississippi joined the Union in 1817. The inequities are painfully obvious, to say nothing of the expenses of litigating record title to these long-held wetlands.

The Mississippi Supreme Court has silenced the private landowners from making any protest about these inequities. The court has foreclosed any claims based on equitable estoppel, adverse possession, limitations or laches. Pet.App. 25a. Thus the State has been held free to impose its fee title retroactively, and without legal jeopardy, all the way back to 1817. It is ironic, but also a fact, that the State's claim is itself flawed under the public trust and equal footing principles.

Many years ago, when considering a mistaken claim of only five years duration, this Court indicated that "it must be a very strong case indeed, and one where mistake and error had been evidently committed," to justify reversing a decision awarding title to real property, "thereby destroy-

ing rights of property which may have been purchased and paid for in the meantime." *Goodtitle* v. *Kibbe*, 50 U.S. (9 How.) 471, 478 (1850).

Petitioners suggest that when more than 150 years have elapsed, the case for retroactive adjustment of countless land titles must be more than "very strong." Mississippi has failed to make such a case.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Mississippi should be reversed and the case remanded for further proceedings consistent with the opinion of this Court.

Respectfully submitted,

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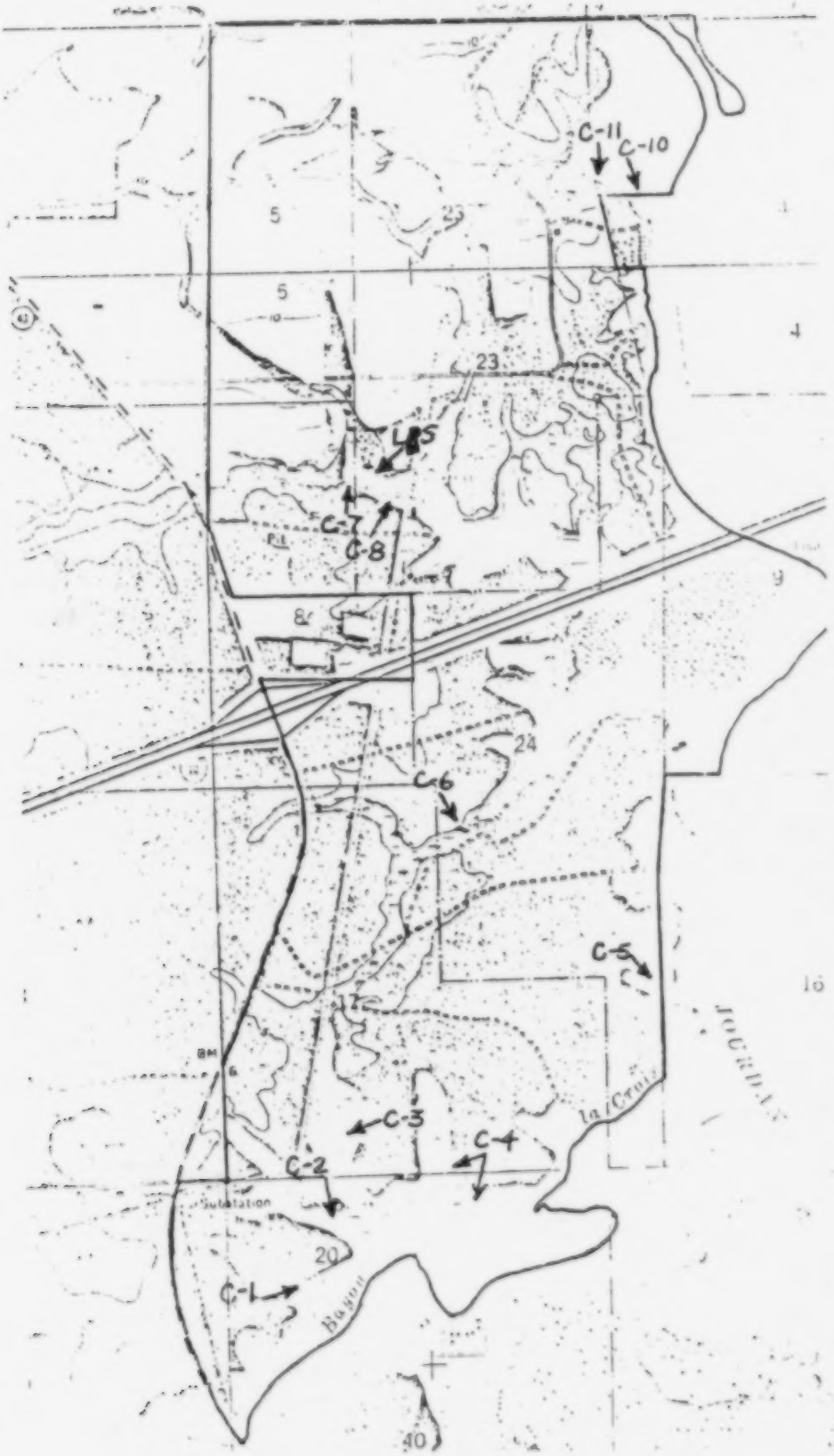
APPENDIX

The attached map is the portion of Exhibit P-167 which shows the area in dispute. Exhibit P-167 was made by taping together U.S. Coast and Geodetic quadrange maps for the Waveland and Kiln quadrangles as photo revised in 1976.

The black line was placed on the map to show the petitioners' boundary line was established by their record titles. The designations C-1 through C-11 were placed on the map to show the State and Sage's claim. These designations are references to the inland creeks claimed by the State as generally designated on three large aerial photographs S-174, S-175 and S-176. In addition to the Creeks the State also claims the North branch of Bayou LaCroix at C-4 and the two lakes in the middle of the map.


C-11
C-10
C-9
C-7
C-8
C-6
C-5
C-3
C-4
C-2
C-1
Substation
Bayou
La Cruz
5
23
24
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40

Supreme Court, U.S.
FILED
JUL 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-870

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

PHILLIPS PETROLEUM COMPANY and
CINQUE BAMBINI PARTNERSHIP
Petitioners

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM U.S. INC.,
Respondents.

BRIEF FOR RESPONDENT SAGA PETROLEUM U.S. INC.

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BEST AVAILABLE COPY

QUESTION PRESENTED

How was the scope of Mississippi's public trust lands determined when Mississippi became a state?

RULE 28.1 LISTING

The Rule 28.1 list of parents and affiliates of the Petitioner Saga Petroleum U.S. Inc. is set forth on page ii of its Brief in Opposition to Petition for a writ of Certiorari to the Supreme Court of Mississippi. There have been no changes in that list since the filing of the brief.

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STATEMENT OF THE CASE

The controversy before this court involves a title dispute as to approximately 600 acres of wetlands in Hancock County, Mississippi. The property is bounded on the east by the Jourdan River, a major watercourse, and on the south by the Bayou LaCroix, which flows into the Jourdan River. The Jourdan River, in turn, dispenses into the Bay of St. Louis, an inlet of the Gulf of Mexico. The property is covered by water that is subject to the ebb and flow of the tide.

In 1977, the Mississippi State Mineral Lease Commission granted oil and gas leases to Respondent Saga Petroleum U.S. Inc., covering the aforementioned 600 acres of land. As a result, the Petitioner Cinque Bambini Partnership and other title holders of record filed suit against the Respondents State of Mississippi and Saga Petroleum U.S. Inc., alleging that the property subject to the leases was actually part of 2,400 acres of land owned by the title holders. In the Chancery Court of Hancock County, Mississippi, the Respondents defended their actions on the ground that title to disputed property was held by the State pursuant to the public trust doctrine.

The Supreme Court of Mississippi affirmed in part, and reversed in part the Chancery Court's decision. *Cinque Bambini Partnership v. Mississippi*, 491 So. 2d 508 (Miss. 1986). Specifically, the supreme court concurred with the chancery court determination that the State was entitled to lands subject to the ebb and flow of the tide. The supreme court held that certain parts of the property, on which man-made lakes had been created, did not constitute public trust lands. *Id.* at 520. The supreme court remanded the case to the chancery court for a precise factual determination of the location of the mean high tide line that identified the boundary between uplands and wetlands, and thus between private and state-owned property. *Id.* at 521-22.

The Petitioners' Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi has been granted by this Court.

SUMMARY OF ARGUMENT

The Supreme Court of Mississippi properly determined that the State of Mississippi acquired title to lands beneath nonnavigable as well as navigable tidal waters pursuant to the public trust doctrine. This conclusion is supported by decisions of the Supreme Court of the United States, as well as by English and American cases rendered before and at the time of Mississippi's entry into the union. These cases hold that the sovereign's (or a state's) interest extends to the lands beneath water subject to the ebb and flow of the tide.

The Petitioners challenge the ruling of the Supreme Court of Mississippi, arguing that the Court applied the wrong test in ascertaining the scope of Mississippi's public trust lands. Specifically, the Petitioners contend that the State's public trust lands are limited to those lying beneath waters that are navigable in fact rather than those that are subject to tidal influence. This claim has no merit since it conflicts with the applicable common law rule for defining the sovereign's interest in lands beneath waters when the first thirteen states were born and when Mississippi joined the Union. These points in time serve as the benchmarks for ascertaining the test that determined the scope of Mississippi's public trust lands and for the application of that test for the purpose of identifying permanently the trust lands. Case law cited by the Petitioners from later time periods cannot undermine the foundation of Mississippi's trust lands. Nor does the Petitioners' authority from the preceding era provide substantial support for their argument. Indeed, the Petitioners have been compelled to rely on authority pertaining to the public's right of passage over navigable waters as the primary support for their argument.

While the public's right of passage over water is undeniably linked closely with the issue of navigability, the primary issue in the present case involves the determination of title to the soil.

The Supreme Court of Mississippi has properly considered the sources of Mississippi's public trust lands and thereby concluded that the soil beneath the State's tidal waters falls within the public trust. Thus, the court's decision should be affirmed.

ARGUMENT

I. THE SUPREME COURT OF MISSISSIPPI PROPERLY RULED THAT THE SCOPE OF MISSISSIPPI'S PUBLIC TRUST LANDS WAS DETERMINED BY THE "EBB AND FLOW" OF THE TIDE.

The State of Mississippi claims title to the land in controversy by virtue of the public trust doctrine. The Supreme Court of the United States described this doctrine in the following passage from the case of *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 435 (1892):

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.

The Petitioners suggest that the first federal embodiment of the doctrine appeared in 1841 with the Supreme Court's decision in the case of *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842) (*see* Brief for Petitioners at 29). A proper analysis of the doctrine cannot commence with an examination of the federal law of 1841, however. Mississippi be-

came a state in 1817. Well settled is the rule that the scope of a state's public trust lands must be determined at the time that the state joins the Union. *See, e.g., Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 376 (1977); *United States v. Utah*, 283 U.S. 64, 75 (1931); *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471, 477 (1850). The nature of the doctrine in 1817 and before, and the principles from which it descended, are far more important to the determination of this case than developments beginning in 1841.

The public trust doctrine was derived from a combination of English common law principles. Of primary interest in the present case is the principle governing the ownership of lands beneath waters. English courts have long recognized that the sovereign holds title to the land beneath tidal waters within the sovereign's domain. *See, e.g., Bulstrode v. Hall*, 82 Eng. Rep. 1024 (1663); *see also* 3 J. Kent, *Commentaries on American Law* 427 (14th ed. 1896); *see also Commonwealth v. Alger*, 61 Mass. 53, 65 (1853) (holding that "[b]y the common law of England, as it stood long before the emigration of our ancestors to this country and the settlement of the colony of Massachusetts, the title to the land or property in the soil, under the sea, and over which the tide waters ebbed and flowed, including flats, or the seashore, lying between high and low water mark, was in the King, as the representative of the sovereign power of the country"); *Day v. Day*, 22 Md. 530, 536 (1865) (holding that the owners of lands adjacent to tidal waters had no claim to the lands beneath such waters, which belonged to the public).

Controversy exists as to the breadth of this right at common law; some commentators suggest that English courts did not routinely recognize that the sovereign's interest extended beyond the low-tide to the high-tide line until after the American Revolution. *See Bell v. Town of* Wells, 510

A.2d 509, 511 (Me. 1986). Nevertheless, when early American courts addressed the issue of the ownership of lands beneath waters, they invariably concluded that the common law embraced the "ebb and flow" test and included all tidal land up to the high-tide line within the sovereign's interest. *See Shively v. Bowlby*, 152 U.S. 1, 11-13 (1894). These same rights were deemed to pass to the 13 original states when each became a state. In the case of *State ex rel. Rice v. Stewart*, 184 Miss. 202, 184 So. 44, 49 (1938), the Supreme Court of Mississippi analyzed the leading authority pertaining to the acquisition of sovereign rights in public trust lands by the 13 original states:

> [A]s to the rights held by the original states, it was said in Mumford v. Wardwell, 6 Wall. 423, 432, 18 L. Ed. 756, that: "When the Revolution took place, the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them, subject only to the rights since surrendered by the Constitution" [page 436]. Again in Appleby v. New York, 271 U.S. 364, 46 S.Ct. 569, 70 L.Ed. 992, it is said that [page 573]: "Upon the American Revolution, all the proprietary rights of the crown and Parliament in and all their dominion over lands under tide-water vested in the several states," etc. See, also, the rule announced in 27 R.C.L. 1356-1359, and in the cases of Martin v. Waddell, 16 Pet. 367, 10 L.Ed. 997; Weber v. State Harbor Commissioners, 18 Wall. 57, 21 L.Ed. 798; Goodtitle v. Kibbe, 9 How. 471, 13 L.Ed. 220; McCready v. Virginia, 94 U.S. 391, 24 L.Ed. 248; and Knight v. United States

> Land Association, 142 U.S. 161, 12 S.Ct. 258, 35 L.Ed. 974. In the Knight Case, Mr. Justice Lamar, in delivering the opinion of the court, said [page 264]: "It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tidewaters in the original states were reserved to the several states, and that the new states since admitted have the same rights, sovereignty, and jurisdiction in that behalf, as the original states possess within their respective borders". And, in the more recent case of Borax Consolidated, Ltd. et al. v. City of Los Angeles, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9, all of the foregoing authorities are cited with approval, and it was therein expressly held that the Federal government has never had the power to convey land beneath tide waters within the borders of a state, after the admission of such state into the union.

The courts of Mississippi have long recognized that the state of Mississippi, like the original 13 states, was entitled to lands beneath waters subject to the ebb and flow of the tide. *See, e.g., State ex rel. Rice v. Stewart, supra*; *Rouse v. Sancier's Heirs*, 166 Miss. 704, 146 So. 291 (1933); *Money v. Wood*, 152 Miss. 17, 118 So. 357 (1928); *Martin v. O'Brien*, 34 Miss. 21 (1857). Other states also embraced the common law rule. *See, e.g., Adams v. Pease*, 2 Conn. 481 (1818); *Middletown v. Pritchard*, 4 Ill. (3 Scam.) 509 (1842); *Commonwealth v. Chapin*, 22 Mass. (5 Pick.) 203 (1827); *Berry v. Carle*, 3 Me. 269 (1825); *Scott v. Willson*, 3 N.H. 321 (1825); *Commissioners of the Canal Fund v. Kempshall*, 26 Wend. 404 (N.Y. 1841); *Gavitt v. Chambers*, 3 Ohio 495 (1828); *Hays v. Bowman*, 22 Va. (1 Rand.) 417 (1823).

Admittedly, in the first decades of the nineteenth century, the opinions of some American courts did contain some general language indicating that the sovereign's (or public's) rights attached to lands beneath "navigable waters." *See, e.g., Chapman v. Kimball*, 9 Conn. 38, 40 (1831). However, American courts of the era used such language in accordance with the English common law principle whereby the phrase "navigable waters" is a term of art referring to waters that are subject to the ebb and flow of the tide. *See Simons v. French*, 25 Conn. 346 (1856) (recognizing that under English common law, navigable waters are those in which the tide ebbs and flows, and that the King is the owner in fee of such lands); *Hollister v. Union Co.*, 9 Conn. 435, 437 (1833) (noting that the Connecticut River was a "public navigable river" since it was subject to the ebbing and flowing of the tide"); *Day v. Day*, *supra*, 22 Md. at 530 (holding that rivers and streams within the ebb and flow of the tide are deemed to be navigable waters); *Flanagan v. City of Philadelphia*, 42 Pa. 219, 229 (1862) (identifying the common law rule that tidal waters are considered to be navigable waters); *see also Elwood v. City of New York*, 450 F. Supp. 846, 861 (S.D.N.Y. 1978) (discussing the relationship between "tidal" and "navigable" waters at common law). Thus, the mere use of the term "navigable waters" in such instances neither implies the use of a "navigability in fact" test nor reflects any substantive departure from the traditional "ebb and flow" test.

Some American colonies did deviate from the "ebb and flow" test in other ways, however. For example, in 1641 Massachusetts passed an ordinance modifying the common law rule by granting private land owners title to lands 100 rods below the high-tide mark in order to encourage the construction of piers and similar structures by private parties. *See Storer v. Freeman*, 6 Mass. 438 (1810). Pennsylvania, by contrast, recognized that the public had broader rights in lands beneath waters than provided for at common

law. There, the public trust lands were deemed to include the lands beneath both tidal water *and* waters that were navigable in fact. As noted in the case of *Flanagan v. City of Philadelphia*, *supra*, 42 Pa. at 230, "in Pennsylvania we have followed the civil law definition of navigable rivers, rather than those of the common law, and we hold as navigable not only those streams which are subject to tides, but all rivers capable of being navigated; that is navigable in the common sense of the term. . . . In this we have departed not only from the common law of England, but from the law of most, though not all our sister states."

As indicated in section III of this brief, the exceptional approach taken by Pennsylvania through the mid-nineteenth century is noticeably similar to that taken by the Supreme Court of the United States thereafter. Yet American courts of the eighteenth and early nineteenth centuries generally disdained any "navigability in fact" test as a means of determining the ownership of lands beneath waters. Indeed, until well after Mississippi joined the Union, even jurisdictions that did deviate from strict adherence to the "ebb and flow" test did so in full recognition that the "ebb and flow" test governed as the common law rule.

In the present case, the Supreme Court of Mississippi rendered its decision regarding the scope of Mississippi's public trust lands after considering the controlling state authority of the period when Mississippi joined the Union. As discussed above, in Mississippi and elsewhere that authority embraced the test based upon the ebb and flow of the tide. Thus, the Supreme Court of Mississippi quite properly ruled that the tidal property in question in the present case falls within the State's public trust lands.

The same conclusion is reached when one compares the public trust lands of Mississippi with those of the 13 original states. As discussed in section III of this brief, pursuant to

the "equal footing" doctrine, Mississippi is entitled to the *same* rights regarding public trust lands as held by the original 13 states. At the time of their birth between 1787 and 1790, those states immediately acquired the sovereign rights previously held by the King of England over the lands within their boundaries. Such rights extended to the soil beneath tidal waters. Today, Mississippi's public trust lands cannot be redefined so as to preclude the State from holding the same rights to tidal lands that the first 13 states held.

II. THE PETITIONERS HAVE IMPROPERLY CHARACTERIZED THE NATURE OF THE PUBLIC TRUST DOCTRINE BY FAILING TO DISTINGUISH BETWEEN THE RIGHT OF PASSAGE OVER NAVIGABLE WATERS AND THE RIGHT TO THE LANDS BENEATH WATERS.

The public trust doctrine embraces a number of distinct English common law principles involving water rights. Both the sovereign's right to tidal lands and the public's right of passage over navigable waters have been incorporated in the doctrine. In order to understand and apply properly the doctrine, these sources must be analyzed separately, for they were treated as distinct concepts in the English common law. The Petitioners have failed to acknowledge the character of the American doctrine as a composite of English common law rights and principles. English authority addressing one of these rights or principles is not freely applicable to other components of the doctrine. As a consequence of the Petitioners' confusion of the elements comprised by the doctrine, their argument is largely unsupported by authority that is relevant to the issue presented in this case.

English common law has long provided that all members of the public have a right of way over tidal navigable waters, a right that is completely distinct from the sovereign's interest in the lands beneath tidal waters. *See, e.g., Fitzhardinge v. Purcell*, [1908] 2 Ch. 139 (noting that despite the public's lack of rights in soil beneath tidal navigable rivers, the public does have a right of navigation and fishing over such waters); *Rex v. Montague*, 107 Eng. Rep. 1183 (1825) (wherein J. Holroyd characterized navigable waters as a highway). The Petitioners have relied almost exclusively on this body of authority involving rights of passage to support the argument that the sovereign's interest extends only to

those lands that are beneath waters which are navigable in fact. Thus, the cases of *Mayor of Colchester v. Brooke*, 7 Q.B. 339, 115 Eng. Rep. 518 (1845); *Rex v. Montague*, *supra*; *Rose v. Miles*, 105 Eng. Rep. 773 (K.B. 1815); *Mayor of Lynn v. Turner*, 1 Cowp. 86, 98 Eng. Rep. 980 (K.B. 1774); and *Pierse v. Fauconberg*, 97 Eng. Rep. 320 (1757), cited by the Petitioners, all address the issue of the public's right of passage over waters rather than the sovereign's interest in the lands beneath waters.

This body of law simply does not support the Petitioners' argument in the present case. English courts have been reluctant to eschew the "ebb and flow" test for a "navigability in fact" test as a means of determining the sovereign's interest in the soil beneath waters. This point is illustrated by a number of English decisions that indicate that the soil beneath waters navigable in fact, but nontidal, does not belong to the sovereign. *See, e.g., Bristow v. Cormican*, 3 App. Cas. 641 (1878); *Lichester v. Raishleigh*, [1889] 38 W.L.R. 104, 61 L.T.R. 477 (n.s.), 5 T.L.R. 739.

In the cases cited by the Petitioners, however, it is not surprising that the courts have considered the issue of navigability in fact in reaching their decisions. Those cases did involve the right of passage over waters. Where navigation is impossible, no public use for passage can exist. Thus there is a strong logical connection between a "navigability in fact" test and the right it defines.

American courts have also recognized the public's right of passage over navigable waters. As stated in the case of *Gray v. Gray*, 178 Md. 566, 16 A.2d 166, 170 (1940), "[a]t common law, such waters as are navigable in the popular sense of the word, regardless of whether the tide ebbs or flows in them, are public highways." *See also State v. Hooper*, 3 Conn. Cir. Ct. 143, 209 A.2d 539 (1965); *Lenoir*

County v. Crabtree, 158 N.C. 357, 74 S.E. 105 (1912). Nevertheless, in the early part of the nineteenth century, American courts maintained the distinction between the right to the lands beneath the water and the right to passage over the water. Furthermore, courts noted a distinction between the appropriate tests for determining the scope of these rights. This point is illustrated by the following passage from the case of *Cobb v. Davenport*, 32 N.J.L. 369, 378-79 (Sup. Ct. 1867):

> [B]y the common law all waters are divided into public waters and private waters. In the former, the proprietorship is in the sovereign; in the latter, in the individual proprietor. The title of the sovereign being in trust for the benefit of the public--the use, which includes the right of fishing and of navigation, is common. The title of the individual being personal in him, is exclusive--subject only to a servitude to the public for purposes of navigation, if the waters are navigable in fact.
>
> The test by which to determine whether waters are public or private, is the ebb and flow of the tide. Waters in which the tide ebbs and flows--so far only as the sea flows and reflows, are public waters; and those in which there is no ebb and flow of the tide, are private waters.
>
> These principles of the common law are so well settled, that a citation of authorities on the subject is quite unnecessary. They are stated and illustrated in Hale's Treatise, *De Jure Maris*, (*Harg.*

Law Tracts,) a book of so high authority, that from it there seems to be no appeal, either by sovereign or subject, upon any question relating to their respective rights, either in the sea, arms of the sea, or private streams of water. 6 *Cow.* 536, *note to Ex parte Jennings*; *The People v. Platt*, 17 *Johns.* 210, per Spencer, J.; *Hooker v. Cummings*, 20 *Johns.* 90; *Morgan v. Reading*, 3 *Smedes & Marshall* 366; 3 *Kent* 411, 412; 2 *Washb. R. Prop.* 632.

And all the cases in which waters above the ebb and flow of the tide, such as the great inland lakes and the larger rivers of the country, are held to be public in any other sense than as being subjected to a servitude to the public for purposes of navigation, are confessedly a departure from the common law.

The tidal test, as distinguishing waters in which the property is in the sovereign, from those in which it is in private individuals, was said on the argument to be founded in no principle. Many of the rules of the common law, by which rights are ascertained and prop- erty is acquired, held, and transmitted, if subjected to such criticism would be found to be equally devoid of principle. As a rule by which individuals may be guided in ascertaining what rights belong to them, as a portion of the public, and what are exclusively within the domain of private ownership, it has the merit of uniformity and certainty, and is easy of application. The criterion sug-

> gested on the argument, of holding all rivers which are navigable in fact to be public rivers, and those which are not navigable in fact to be private rivers, is wanting in that accuracy and certainty at which the law aims. It can only be made certain by the addition of some arbitrary rule, such as depth of water, quantity of tonnage, or the like, and even then is still open to the objection that no man can tell whether he is exercising a public right, or trespassing upon a private right, without entering upon an investigation, and thus the way is opened for discussion and disturbances.

Similarly, other American courts have recognized that the issue of navigability in fact, while plainly relevant to the public's right of passage over waters, is not relevant to the issue of the ownership of soil beneath waters. For example, in the case of *Flanagan v. City of Philadelphia*, *supra*, 42 Pa. at 229-30, the court set forth the following analysis regarding the public's interest in passage over, and the soil beneath, water:

> At common law, those rivers only are called navigable in which the tide ebbs and flows. . . . [Nevertheless] "there be other rivers, as well fresh as salt, that are of common or public use for the carriage of boats and lighters; and these, whether they are salt or fresh, whether they flow and reflow or not, are *prima facie*, *publici juris*, common highways for man, goods, or both, from one inland town or another." The common law definition of navigable rivers affects, therefore rather the

> proprietorship in the soil or bed of the river than the right of navigation.

(Quoting Hargrave's Tracts, *De Jure Maris*, ch. 3.)

In short, the use of a "navigability in fact" test to determine the scope of the sovereign's or public's rights in soils beneath waters is logically inappropriate since the uses of such lands are not limited to navigation or passage over the water. Despite the Petitioners' assertions to the contrary, the sovereign's common law interest in the lands beneath tidal waters did not serve the sole objective of facilitating or controlling navigation. For example, in the seventeenth century, the primary objective of the sovereign in laying claim to the lands beneath the high and low tide lines was to generate revenue for the Crown from the sale of fishery and other rights in the foreshore. *See* Taylor, "The Seashore and the People," 10 *Cornell L.Q.* 303, 306 (1925). American courts have also recognized that public trust lands serve a variety of functions unrelated to navigation, including fishing, swimming, fowling, and other purposes. *See, e.g., State v. George C. Stafford & Sons, Inc.*, 99 N.H. 92, 105 A.2d 569 (1954); *Matthews v. Bay Head Improvement Association*, 95 N.J. 306, 471 A.2d 355, *cert. denied*, 469 U.S. 821 (1984); *Arnold v. Mundy*, 6 N.J.L. 1, 12 (Sup. Ct. 1821).

In the present case, representatives of the State of Mississippi have leased portions of the state's tidal lands for the purpose of obtaining revenue and thereby benefiting the state's citizens. The Supreme Court of Mississippi has followed a well-beaten path of authority in protecting the state's right to use its public trust lands for a purpose unrelated to navigation.

The disputed lands in the present case fall within the public trust even if navigation is held to be a factor in determining the scope of public trust lands. The Petitioners'

authority pertaining to a "navigability in fact" test is not dispositive of the present controversy, since that authority primarily involves issues of admiralty rather than title to soil. Where navigation is related to the use of the lands beneath waters, courts have embraced the "ebb and flow" test. A number of federal courts have determined that waters not navigable in fact are nevertheless deemed to be "navigable waters" for the purpose of determining the scope of the federal navigational servitude. *See*, e.g., *United* States *v. Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975) (holding that the scope of the federal servitude is defined by the ebb and flow of the tide and therefore extends to include tidal marshes); *United States v. Weisman*, 489 F. Supp. 1331, 1340 (M.D. Fla. 1980) (in considering whether tidal creeks are navigable, the court held that "the legal status of a determination of navigability applies laterally over the entire surface of the water body and extends shoreward to the mean high water mark"; where a tidal creek lies adjacent to a navigable river, "no inquiry is required here concerning the potential of these tidal creeks for commerce or transportation"). *See also United States v. Cannon*, 363 F. Supp. 1045 (D. Del. 1973); *United States v. Lewis*, 355 F. Supp. 1132 (S.D. Ga. 1973).

In light of the federal authority equating the navigability of waters with their tidal influence, the Petitioners' argument should be rejected by this Court.

III. THE SUPREME COURT OF MISSISSIPPI'S APPLICATION OF THE EBB AND FLOW TEST IS FULLY CONSISTENT WITH THE DECISIONS OF THIS COURT WHICH ACKNOWLEDGE THE CONTINUING VITALITY OF THE TEST.

In the years that have followed the birth of the first 13 states, the public trust doctrine has undergone a process of evolution. Contrary to the contention of the Petitioners, this evolutionary process has been one of expansion rather than retraction. There is no basis for assuming that the Supreme Court of the United States has ever had the authority or the intention to deprive the newer states of the public trust rights held by the original 13 states.

When new states were admitted to the Union, they were deemed to have the same rights "in all respects whatever" held by the original states regarding public trust lands. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 224 (1845); see *United States v. Texas*, 339 U.S. 707, 716 (1950). New states entered the Union on "equal footing" with the original 13 states. When Mississippi entered the Union in 1817, it acquired the same rights under the "equal footing" doctrine that were held by the original 13 states. As previously discussed, each of those states acquired rights to the land within its boundaries under waters subject to the ebb and flow of the tide; such was the rule at common law when the original states were born from 1787 through 1790. The scope of Mississippi's public trust lands, established and fixed for all time in 1817, therefore included the soil beneath the state's tidal waters. If this Court were to conclude that the scope of Mississippi's public trust land was determined by the common law rule controlling at the time of Mississippi's entry into the Union, the same result obtains since the "ebb and flow" test was the accepted rule in

Mississippi at that time. No federal authority for a navigability test appeared until considerably later in the century.

Well after Mississippi joined the Union, the Supreme Court of the United States adopted a modified test for determining the scope of public trust lands. In a series of cases beginning with *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842), and reaching to the present day, the Supreme Court has considered the factor of navigability in determining the scope of public trust lands in certain situations. The Petitioners argue that this use of a navigability criterion represents a retraction of the public trust doctrine by the Supreme Court. Such is not the case, however. The primary objection to the claim that the Supreme Court retroactively narrowed the scope of the states' public trust lands by adopting a restrictive test for the determination of such lands arises from the fact that the Supreme Court is without authority to do so. As noted in the case of *Summa Corp. v. California ex rel. State Lands Commission*, 466 U.S. 198, 205 (1984), "[t]he federal government, of course, cannot dispose of a right possessed by the State under the equal footing doctrine of the United States Constitution." Rather, the scope of a state's public trust land is determined and fixed at the time that the state joins the Union.

Instead of narrowing the public trust lands of states that had previously acquired them in accordance with the ebb and flow test, the Supreme Court appears to have *expanded* the public trust and equal footing doctrines for the benefit of inland states that could derive few benefits from sovereign rights to tidal waters. The early members of the Union were generally coastal states or states with large tidal rivers. For these states, the application of the common law ebb and flow test was appropriate. For inland states that subsequently joined the Union, sovereign rights in lands beneath tidal waters amounted to a hollow interest. The

Supreme Court appears to have developed a navigability criterion to provide these late entries into the Union with rights of similar practical substance as those held by the early members of the Union. This conclusion finds support from the fact that the cases in which the Supreme Court applied the navigability criterion to determine the scope of public trust lands generally have involved inland waters. *See, e.g, Montana v. United States*, 450 U.S. 544 (1981); *Oklahoma v. Texas*, 258 U.S. 574 (1922); *Scott v. Lattig*, 227 U.S. 229 (1913); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892).

Indeed, in at least two relatively modern cases, the Supreme Court has reaffirmed its adherence to the ebb and flow test in situations involving coastal waters. In the case of *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, *rehearing denied*, 296 U.S. 664 (1933), the Supreme Court considered whether certain tidelands lying off the coast of California fell within that state's public trust lands. In the opinion of the Court, Chief Justice Hughes stated that "[t]he soils under tidewaters within the original states were reserved to them respectively, and the states since admitted to the Union have the same sovereignty and jurisdiction in relation to such land within their borders as the original states possessed." 296 U.S. at 15. In light of this rule, the Court determined that the ownership of the tidelands in question could be resolved with the use of a simple test: "Was it upland, which the United States could patent, or tideland, which it could not?" *Id.* at 18-19. The Court did not consider the factor of navigability at all in ascertaining the scope of the public trust lands, but instead looked exclusively to the ebb and flow test.

In the subsequent case of *United States v. California*, 332 U.S. 19, *rehearing denied*, 332 U.S. 787 (1947), this Court directly acknowledged that the public trust doctrine had been expanded rather than contracted by stating that both

the soils lying beneath inland navigable waters *and* tidelands were within the trust. 332 U.S. at 36.

In light of the foregoing authority, the Supreme Court of Mississippi has clearly rendered a decision consistent with those of the Supreme Court of the United States. Therefore, the judgment of the Supreme Court of Mississippi should be affirmed by this Court.

IV. EQUITABLE PRINCIPLES DO NOT PREVENT THE OPERATION OF THE PUBLIC TRUST DOCTRINE IN THE PRESENT CASE.

The Petitioners' argument that the state should not be permitted to exercise its public trust rights for equitable reasons is not supported by sound principles of equity. The mere fact that record title holders of the property claim ignorance of the state's public trust interest in the disputed land provides no basis for equitable relief. Regardless of the approach of other jurisdictions regarding the scope of public trust lands over the years, Mississippi courts have consistently applied the "ebb and flow" test to identify the state's public trust lands. *See, e.g., State ex rel. Rice v. Stewart*, *supra*; *Rouse v. Sancier's Heirs*, *supra*; *Money v. Wood*, *supra*; *Martin v. O'Brien*, *supra*. Private parties who have obtained title to property beneath tidal waters simply have no right to rely on such titles in light of the state's well-recognized acceptance of the common law rule. Further, the important objective of maintaining stability within the state's real property title system will plainly be furthered by the affirmation of the state's long-standing adherence to the "ebb and flow" test.

The Petitioners' suggestion that the importance of the private interests at stake in this case is superior to the public interest involved is not persuasive. As to the broader implications of the resolution of this controversy, the importance of the public's interest in tidelands cannot be overstated. From a standpoint of sheer numbers, the scales obviously tip in favor of upholding the rights of the public. All of the citizens of Mississippi (and other states as well) share an interest in the public trust lands. There is no reason to believe that the importance of the public's interest in public trust lands somehow pales by comparison with the interest of private title holders. Indeed, the status of tidelands as

areas of primary public concern has been firmly established in recent years as the various benefits and vulnerabilities of tidelands have become known. This heightened concern is reflected in legislation such as Mississippi's Coastal Wetlands Protection Law, *Miss. Code Ann.* §§ 49-27-1 et seq. (Supp. 1986) and similar acts in other coastal states, which are designed to preserve coastal wetlands.

In light of the significance of the public interest in tidelands, and the failure of the aggrieved private owners to consider properly Mississippi's long-standing application of the "ebb and flow" test to determine the limits of public trust lands, no equitable basis exists to justify the abandonment of that test for the benefit of a limited number of adversely affected private landowners.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Mississippi should be affirmed.

Respectfully submitted,

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No. 86-870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM, U.S., INC.,
Respondents.

On Writ of Certiorari to
the Supreme Court of Mississippi

BRIEF OF RESPONDENT, STATE OF MISSISSIPPI

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QUESTION PRESENTED

At the time Mississippi entered the Union in 1817, under the common law and on an equal footing with the original states, did the public trust lands conveyed by the United States to Mississippi include all tidelands within its boundaries.

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IN THE

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PHILLIPS PETROLEUM COMPANY and
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On Writ of Certiorari to
the Supreme Court of Mississippi

BRIEF OF RESPONDENT, STATE OF MISSISSIPPI

Respondent, State of Mississippi, respectfully prays that this Court, upon reviewing the records, facts and arguments of counsel, will affirm the judgment of the Supreme Court of Mississippi.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT:

[The Confederate Congress, July 13, 1787]

"An Ordinance for the government of the territory of the United States northwest of the river Ohio:

> "Sec. 14. It is hereby ordained and declared by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to-wit:
>
> "Art. II. The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus,* and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law . . . .
>
> * * * * *
>
> "Art. V. . . . such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government: *Provided,* The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles . . . ."

CONSTITUTION OF THE UNITED STATES, ARTICLE IV:

> "Section 3. New States may be admitted by the Congress into this Union; . . . ."

CONSTITUTION OF THE UNITED STATES, TENTH AMENDMENT:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ACT OF MARCH 1, 1817, 3 STAT. 348-349:

> "Section 1. . . . the inhabitants of the western part of the Mississippi territory . . . hereby are authorized to form for themselves a constitution and state government . . . and the said state, when formed, shall be admitted into the union upon the same footing with the original states, in all respects whatever.
>
> * * * * *
>
> "Sec. 4. *And be it further enacted,* . . . authorized to form a constitution and state government: *Provided,* that the same, when formed, shall be republican, and not repugnant to the principles of the ordinance of the thirteenth of July, one thousand seven hundred and eighty-seven, between the people and states of the territory north-west of the river Ohio, so far as the same has been extended to the said territory by the articles of agreement between the United States and the state of Georgia, or of the constitution of the United States: . . ."

CONGRESSIONAL RESOLUTION OF DECEMBER 10, 1817, 3 STAT. 472, 473:

> "Resolution of the admission of the State of Mississippi into the Union.
>
> "WHEREAS, in pursuant of an act of Congress, passed on the first day of March, one thousand eight hundred and seventeen, entitled 'An act to enable the people of the western part of the Mississippi territory to form a constitution and state government, and for the admission of such state into the union on an equal footing with the original states', the people of the said territory did,

on the fifteenth day of August, in the present year, by a convention called for that purpose, form for themselves a constitution and state government, which constitution and state government so formed, is republican, between the original states and the people and states in the territory north-west of the river Ohio, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven –

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, that the state of Mississippi shall be one, and is hereby declared to be one, of the United States of America, and admitted into the union on an equal footing with the original states, in all respects whatever.

APPROVED, December 10, 1817."

SUBMERGED LANDS ACT, 43 U.S.C. Sec. 1301 *et seq.* (1953)

"Sec. 1301. Definitions.

"When used in this subchapter and subchapter II of this chapter –

"(a) The term 'lands beneath navigable waters' means –

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide . . . , and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

* * * * *

"Sec. 1311. Rights of the States

"(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective states in which the land is located, and the respective grantees, lessors, or successors in interest thereof.

"(b) Release and relinquishment of title and claims of the United States. . . .

(1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to

all said lands, improvements, and natural resources; . . ."

STATEMENT OF THE CASE

The dispute of the lower court was in the nature of a land title question; the Mississippi Supreme Court held that certain tidelands[1] in controversy belonged to the State as part of the lands conveyed to it in trust at statehood by virtue of the equal footing doctrine.

The lawsuit arose as a result of action taken by the Mineral Lease Commission of the State of Mississippi to lease lands subject to the ebb and flow of the tide in Hancock County, involving some 600 acres, more or less. The lease clearly specified that the lands subject to lease were below the water mark of mean high tide (Pet. App. 54).[2]

The Petitioners, Cinque Bambini Partnership and other landowners filed suit in Hancock County Chancery Court to confirm title on 2,400 acres, including the land subject to state lease and asserted that state-owned tidelands were lands which they claimed they owned by virtue of federal patents issued to their predecessors in title under Congressional Acts of 1822 and 1830.

The entire 2,400 acres was never claimed by the State to be in the State's public trust domain. Part of the 600 acres leased are not in dispute as trustlands. The remaining 141

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[1] "Tideland" is land between the lines of the ordinary high and low tides, covered and uncovered successively by the ebb and flow thereof; and covered and uncovered by the ordinary tides; land over which the tide ebbs and flows. Black's Law Dictionary, 1652 (4th ed. 1969).

[2] In this brief, "Pet. App." references are to the appendix to the petition for writ of certiorari. "Res. App." references are to the appendix to the brief in opposition to the petition for writ of certiorari.

acres, in dispute, were found by the trial court to be in the public trust lands of Mississippi. The acreage was composed of 42 acres of the North branch of Bayou LaCroix and 11 small unnamed streams and inlets, a larger undetermined acreage under the original Bayou Enciente and Long Gar Bayous, and a connecting channel to the Jourdan River. Much of the land in question is submerged lands, always under water, and the rest is tideland. Adjacent uplands from these two bayous dredged out at the direction of the Cinque Bambini Partnership were for two deep lakes for their own personal use. (Pet. App. 47a, 52a to 57a). This dredging resulted in the destruction of the original mean high tide line on these two bayous, the filling in of the entrance and channel of Bayou Enceinte, and the creation of a new artificial channel.

The Hancock County Chancery Court ruled that the State of Mississippi owned these lands which were subject to tidal influence pursuant to the public trust doctrine, and included the two dredged out lakes. The Mississippi Supreme Court affirmed this ruling except as to the man-made lakes holding the lakes to be in private ownership except for the original beds of the bayou.

The argument advanced by the Petitioners is that the claims of their predecessors in title predated statehood and thus the lands were not delivered pursuant to the public trust but were the subject of Spanish grants. The argument fails because there was no treaty involved between the United States and Spain involving possible Spanish land grants; consequently, the settlers in the region only held claims not grants. Their claims, listed in the *American State Papers, Public Lands,* (Duff Green Edition), Vol. 3 (Res. App. 1a-5a) and Vol. 5 (Res. App. 6a-8a) show that of four claims involved in the case before this Court, three had "no claims derived from either the French, British or

Spanish Governments." Nevertheless, in 1822 each received a donation under § 3 of the Act of May 8, 1822, 3 Stat. 707.

The fourth claim originally appeared not to be entitled to confirmation; however, in § 1 of the Act of May 28, 1830, 4 Stat. 408, after additional testimony, this claim was reviewed and it was confirmed for a reasonable quantity. These confirmed claims were donations of public land by the United States Government based on actual settlement in the area prior to April 15, 1813.

The Petitioners would seek to confuse this Court and cloud the issue presented before this Court by attempting to mask the true question saying their title falls under an exception granted by the United States; however, the facts show these patents were merely in the nature of quitclaim deeds and did not convey any tidelands.

In the case of *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1970), this Court held that the United States may convey property to a private party prior to statehood. The case dealt specifically with a singular exception, i.e., a treaty. There was no treaty protecting these claims of settlers. These four federal patents dated post-Mississippi statehood, conveyed only what the Federal Government could quitclaim away, and under no stretch of the imagination could this include tidelands since Mississippi acquired title to this property earlier at statehood.

Petitioners' first brush with the assertion of dominion by the State of Mississippi over the state-owned tidally influenced lands adjacent to Petitioner Bambini's property was felt by Petitioner specifically on his property at the point when the State found a leaseholder for its interests in Saga Petroleum. However, the public trust doctrine is clear in Mississippi's view by the many decisions having

been rendered by the Supreme Court of Mississippi involving tidal waters not navigable in fact. For a partial listing of these cases, see Pet. App. 13a and 14a.

Contrary to Petitioners' claim, the question presented before this Court does not present an unusual federal question since this Court has settled ownership of tidelands in the new states. The Court has recognized English common law to govern in these cases. *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212 (1845). There was never any requirement by this Court that tidelands must be navigable in fact, as Petitioners suggest, in order to be public trust lands.

The fragmentary quotation (Pet. Brief, pg. 4) from Lord Hale's 17th century manuscript, *De Jure Maris,* has no relevance to the question at issue. Lord Hale referred to the English common law rule that *above the tide* "little streams and rivers that are not a common passage for the King's people" were private both as to ownership and use. M. Hale, *De Jure Maris* (reprinted in S. Moore, History of the Foreshore 374 (1888)).

The Mississippi Mineral Lease Commission never used the maps prepared by the Marine Resources Council to delineate legal boundaries of state-owned tidelands but merely as the best available indication of the state land in question. Exact boundaries could only be determined by surveys and a decision of the Chancery Court. Contrary to Petitioners' claim, the tidelands at issue have never been "privately held" but were vested in the State in 1817.

Petitioners make many attempts to misrepresent the true nature of the tidelands at issue in this case. For instance, "wetlands" is a general term denoting a marshy or swamp area inland and, if the term is used in connection with tidelands, it should be expressed as "coastal wet-

lands." These tidelands are all below sea level and are daily affected by the action of the tide from the Gulf of Mexico. They consist of submerged lands, rivers, bayous and creeks, and all arms of the sea. The level of the water in these lands is controlled entirely from the sea and not from water draining from inland areas above the tide. In no sense of the word could they be described as "drainage ditches."

SUMMARY OF ARGUMENT

Mississippi's arguments are based on this Court's decisions interpreting the common law as it was understood in this country at the close of the Revolution.

Mississippi's position may be summarized as follows:

1. In England under the common law all tidal waters were considered navigable and were held by the Crown in trust for all the people. This country adopted the English common law at the time of its Constitution in 1787.

2. Upon the Revolution the thirteen colonies became sovereign independent states and succeeded to all the sovereign rights and powers of the Crown in the tidelands and tidewaters within their respective borders.

3. By the Tenth Amendment to the Constitution, the original states reserved all powers not specifically granted to the United States. Among the powers retained were their sovereign rights over all their tidelands.

4. Mississippi was admitted into the Union on December 10, 1817, under definite provisions of the Ordinance of 1787 and the Georgia Cession Agreement of April 24, 1802, which required that Mississippi adopt the

common law. The Act of Admission stated that, having met all the requirements of the Ordinance of 1787, Mississippi was admitted into the Union "on an equal footing with the original states in all respects whatever." Thus Mississippi acquired as a sovereign coastal state all the same *rights* to all its tidelands as Georgia and the other original states possessed after the Revolution.

5. The "navigability in fact" test has never been used to determine ownership of tidelands by the states.

6. The Submerged Lands Act of 1953, 43 U.S.C.A. Section 1301, *et seq.*, codified the decisions of this Court regarding tidelands and confirmed the rights of the states in all tidelands within their respective borders.

ARGUMENT

I.

The Public Trust Doctrine Relating to Tidelands is Predicated on the Ebb and Flow Test

The common law of England is the basis for the public trust doctrine in this country; the "ebb and flow" test was the only test used for determining the extent of the Crown's ownership of the lands held under the public trust which defined the boundary between public and private ownership as the ordinary high water mark of the tide.

The common law "ebb and flow" test of royal ownership was the only reasonable method to define the boundary between public and private ownership in the waters of England. Considering the times, it was the only easily understood standard of measurement. As this Court said in *The Propeller Genesee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443, 454 (1851), "they took the ebb and flow of the

tide as the test [of waters owned by the King] because it was a convenient one."

The word "navigable" is said to be derived from the rights of free navigation of the sea and the right of access to any part of the shore from the sea, common to all the King's subjects. The English court, in *The Case of the Royal Fisheries of the Banne,* Davies' Rep. 149 (circa 1604), reasoned that the King owned every navigable (tidal) river "because such river participates of the nature of the sea, and is said to be a branch of the sea so far as it goes . . . ." Whenever the term "navigable" is used in the common law, it has a technical meaning "wherever the tide ebbs and flows," and has no reference to capacity for navigation. "Navigable water" and "tidewater" were synonymous terms used interchangeably.[3] There was never any

[3] *Navigable:* ". . . the term is often, particularly at common law, understood in a more restricted sense, viz., subject to the ebb and flow of the tide." Black's Law Dictionary 1178 (4th ed. 1969).

"Navigable River or Stream: "At common law, a river or stream in which the tide ebbs and flows, or as far as the tide ebbs and flows. 3 Kent, Comm 412, 414, 417, 418 . . . ." *Id.* at 1179.

"On the other hand it was held, that in rivers not navigable [and in the common law sense of the term, *those only were deemed navigable in which the tide ebbed and flowed]* the owners of the soil on each side had the interest, and the right of fishery; and it was an exclusive right, and extended to the centre of the stream opposite their respective lands." Commentaries on American Law by James Kent, Vo. III, p. 412 (1889).

The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 454, 455 (1851): "In England, therefore, tidewater and navigable water are synonymous terms, and tide-water . . . meant nothing more than public rivers, as contra-distinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence, the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide . . . And, indeed, until the discovery of steamboats, there could be nothing like foreign com-

mention of navigability in fact as a factor in determining public ownership under the common law.

The rules and principles laid down by Lord Chief Justice Hale, as found in his 17th century treatise, M. Hale, *De Jure Maris* (reprinted in S. Moore, History of the Foreshore (3rd ed. 1888)), are acknowledged by this Court in *Martin v. Lessee of Waddell,* 41 U.S. (16 Pet.) 367 (1842) and *Shively v. Bowlby,* 152 U.S. 1 (1849), as containing the correct common law doctrine as to the rights and power of the King over the navigable (i.e., tidal) waters of England.

> "In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King . . . and that this title . . . is held subject to the public right of navigation and fishing." 152 U.S. at 13.

According to Lord Hale, the King owned in trust for the people all waters subject to the ebb and flow of the tide, and the soils beneath them, to the ordinary highwater mark.[4] This included the "sea and soil thereof," the "shore," and 'an arm or creek of the sea." Moore at 376, 377, 378. Lord Hale declared:

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merce upon waters with an unchanging current resisting the upward passage. The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. It measured it by tide-water . . . ."

[4] See Maloney and Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping,* 53 N.C. L. Rev. 185, 200 (1975), citing English cases which "firmly established" the Hale doctrine by the end of the 17th century, that the foreshore and the soil beneath arms and creeks of the sea as far as the ebb and flow of the tide belonged to the King.

> "The shore is that ground that is between the ordinary high-water and low-water mark. This doth prima facie and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea." Moore at 377.
>
> "Ford the second, that is called an arm of the sea where the sea flows and reflows, and so far only as the sea so flows and reflows; . . . ." *Id.*

Also, according to Lord Hale, all rivers above the tide and the soils beneath belonged to the adjacent owners to the center of the stream. Moore at 370. All rivers, both fresh and salt, "that are of common or public use for carriage of boats and lighters" were "common highways for man or goods or both from one inland town to another." *Id.* at 374. Small nontidal streams, if unsuitable for common highways, were private both in use and ownership. *Id.*

The meaning of the common law as it related to the sovereign rights of the original states in their tidewaters is that enunciated in *Arnold v. Mundy,* 6 N.J.L. 1 (N.J.S. Ct. 1821). The New Jersey Supreme Court asserted the sovereign ownership of the State in the tidal waters of New Jersey to the same extent as the King of England had held them before the Revolution. After reviewing Lord Hale's treatise that all waters subject to the ebb and flow of the tide belonged to the King as a common law right and the *Case of the Royal Fisheries of the Banne River* in Ireland, which held the same, the court ruled that previous grants made to lands under tidewaters had no validity because neither the king nor any of his agents had the power to grant proprietary rights in these waters.

The same common law concept of ebb and flow was confirmed in *Martin v. Waddell.* The *Shively* Court, 152 U.S. at 15, referred to it as "the leading case in this court,

as to the title and dominion of *tide waters* and of the lands under them." (Emphasis added) This Court recognized that the public trust doctrine applied in this country as well as in England, by affirming New Jersey's sovereign ownership of tidelands in trust for the people as against prior commitments by the King or his agents. The Court placed "great weight" on *Arnold v. Mundy's* common law precedents and accepted Lord Hale's doctrine of royal ownership. The Court went on to say that, although there had been some question in England whether the King could grant exclusive rights in tidal waters, it regarded the matter settled that since the Magna Carta, the King could not validly make private grants in tidal waters; and that, furthermore, it was of no consequence in this country:

> "For when the Revolution took place the people of each State became themselves sovereign; and in that character hold the *absolute right* to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the constitution to the general government." 152 U.S. at 15.

Thus, this Court established that each state's right to own its tidelands became a part of the common law of this country. The thirteen original states as new sovereigns succeeded to all the prerogative rights of the King[5] and Parliament in tidal waters within their respective jurisdictions. This included "the great right of dominion and ownership in the rivers, bays, and arms of the sea, and the soils under them," which were part of the sovereignty of the Crown. *Martin v. Waddell,* at 416. By injecting navigability in fact

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[5] "At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England and familiar with the prerogatives exercised by the Crown." *Ex Parte Grossman,* 267 U.S. 87, 110 (1924).

as a test of royal ownership, Petitioners misunderstand the accepted meaning of the common law in this country at the time of the Revolution, which is the governing law concerning the rights of the thirteen original states in their tidewater.

> "The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country . . . ." *Shively v. Bowlby*, 152 U.S. 1, 14.

All tidal waters were deemed to be "navigable," and all waters above the tide were known as "non-navigable."[6] The extent of ownership of tidelands and tidewaters by the original states must be determined by reference to the common law of England since this was our country's recognized law in 1787.

The case of the *Mayor of Colchester v. Brooke*, Q.B. 339, 115 Eng. Rep. 518 (1845) cited by Petitioners was not unlike other cases cited by them, and dealt with a tidally influenced waterway, which at low tide wasn't "navigable in fact" in the sense that vessels did not have sufficient draft to navigate, and as such the vessels were susceptible to grounding on oyster beds. Chief Justice Lord Denman stated at page 374, "The right of soil in arms of the sea and public navigable rivers, *which the Crown prima facie has independently of any ownership in the adjoining lands*, must in all cases be considered as subject to the public

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[6] In an early New York case, *Palmer v. Mulligan*, 3 Caines 307 (N.Y. S.Ct. 1805), 2 Am. Dec. 270, Chancellor Kent recognized the common law rule that only tidal waters were navigable, saying that "the Hudson at Stillwater is a fresh water river, *not navigable in the common-law sense of the term, because the tide does not ebb and flow at that place.* In the *Royal Fishery of the Banne*, it was resolved that by the rules and authorities of the common-law every river where the sea does not ebb and flow is an inland river, not navigable, and belonged to the owners of the adjoining soil." (Emphasis added)

right or passage . . . ." (Emphasis added). This case only tends to reiterate Respondents' argument, which is that each state acquired under the equal footing doctrine the rights ascribed to it by English common law, and therefore the State of Mississippi owns all lands subject to tidal influence.

As further authority for Petitioner's erroneous view of the English common law, they quote, out of context, from Chapter III of Lord Hale's treatise *De Jure Maris*. (Pages 20 and 21 of Petitioners' brief). They fail to note that Chapters I and II of the treatise were limited to discussion of freshwater rivers in which it was stated that all rivers above the tide, regardless of size, were privately owned. Chapter III dealt entirely with use of rivers both above and below the tide, and the quoted passage, referring to rivers above the tide, stated that little rivers too small to be used as a common passage were private both in ownership and in use. Larger rivers, both above and below the tide, were subject to public use as common highways. The ownership of waters below the tide was not discussed until Chapter IV, in which Lord Hale stated that the King owned the seabed and the shores of the sea, the arms of the sea, the rivers and creeks up to the point of ordinary high tide, for the benefit of the people.

The illogical conclusion arrived upon by Petitioners is a distinct distortion of Lord Hale's doctrine. Lord Hale made a definite distinction between ownership in tidal and nontidal waters on the sole basis of ebb and flow of the tide, which set the dividing line between private ownership of waters above the tide and ownership by the King below the tide. Under the common law the use of a river as a common highway had no bearing on its ownership.

Petitioners also imply that English case law has consistently followed their interpretation of Lord Hale's rules,

citing *The Case of the Royal Fisheries of the Banne,* Davies' Rep. 149 (1604). At issue was the validity of a grant from the King of a fishery in the Banne River at a point where the river was tidal. On pages 21 and 22 of their brief, Petitioners quote from the court's opinion in the language of the time under which every river was deemed navigable up to the point of high tide and, as a branch of the sea, was owned by the King; and every other river was in private ownership. This statement was in complete accord with Lord Hale's doctrine. However, Petitioners imply that the word "navigable" in this passage meant "navigable in fact" and that the case clearly distinguished between navigable in fact and non-navigable in fact rivers, ascribed royal ownership to the former and private riparian ownership to the latter. This is contrary to the common law. As the court plainly stated, the King's ownership extended only to the point of high tide and *not* as far as the river was actually navigable. It is enough to say that any views that might have been expressed by English courts, or by commentary cited by Petitioners, are immaterial to the present controversy.

Upon the adoption of the Constitution in 1787, the thirteen original states reserved the rights to all tidelands within their respective borders, without limitation of any kind, under the Tenth Amendment[7] to the Constitution, as acknowledged by this Court in *Pollard.* 44 U.S. at 230.

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[7] The Tenth Amendment to the Constitution, adopted by Congress September 25, 1789, provided: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the United States, are reserved to the States respectively, or to the people."

"In order that there should be no uncertainty in respect of what was taken and what was left, the national powers of legislation were not aggregated but enumerated – with the result that what was not embraced by the enumeration remained vested in the states without change or impairment." *Carter v. Carter Coal Co.*, 298 U.S. 294 (1935).

There is no similarity between the present case and *Montana v. United States,* 450 U.S. 544 (1981), in which this Court held that title to the bed of the *nontidal* Big Horn River passed to Montana upon its admission into the Union under the federal navigability in fact test for state ownership of waters above the tide. Thus, the *Montana* case has nothing in common with Mississippi's ownership of its tidelands under the common law public trust doctrine recognized in 1817. In fact, Petitioners admit that such test "was first brought into the public trust arena for *nontidal* rivers" in *Packer v. Bird,* 137 U.S. 661 (1891).

The most recent case involving the equal footing doctrine decided by this Court is that of *Utah Division of State Lands v. U.S.*, No. 85-1772, slip opinion (U.S. Supreme Court, decided June 8, 1987), involving oil and gas leases for land under Utah Lake wherein the federal government asserted it had reserved the lake bed prior to Utah's statehood for use as a reservoir. The state plead that title passed to the State by the "equal footing doctrine." This Court stated at page 1:

> "The equal footing doctrine is deeply rooted in history, and the proper application of the doctrine requires an understanding of its origins. Under English common law the English crown held sovereign title to all lands underlying navigable waters . . . . Because all subsequently admitted states enter the Union on an 'equal footing' with the original thirteen states, they too hold title to the land under navigable waters within their boundaries upon entry into the Union. *Pollard's Lessee v. Hagan,* 3 How. 212 (1845)."

This Court further went on to hold that examination of the title to beds of navigable waters begins with a strong

presumption against conveyance by the United States and unless clearly defined, would not convey land under waters of a stream. This Court found that Utah was correct in acquiring the lands under equal footing and thereby reversed the lower court's decision.

II.

Rights of the Original States in the Tidelands

Since *Martin v. Waddell* held that no grants made by the King or his agents in this country were valid, the absolute rights to *all* the lands subject to the ebb and flow of the tide up to the high water mark passed automatically from the Crown to the original states as new sovereigns at the end of the Revolution. No claims needed to be made to tideland as it was an attribute of sovereignty.

Thus, the rights that each of the original states such as New Jersey acquired to all tidelands within its borders is precisely the same right which was vested in Mississippi in 1817 under the equal footing rule. There can be no distinction between those states which acquired their independence by force of arms and those which acquired it by the peaceful consent of the older states.

Yet each of the original states as absolute sovereigns could deal with its tidelands according to its own views, reserving its own control over them or granting rights therein to individuals or corporations. Some states modified the common law and added navigable in fact waters above the tide to their public trust lands, as in Pennsylvania and New York and other states granted rights in the tidelands to individuals, as in Connecticut and Massachusetts. As the *Shively* Court stated, once they received the tidelands it was their right to dispose of them as they wished:

> "The . . . summary of the laws of the original states shows that there is no universal and uniform law upon the subject; but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over them, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Greater caution, therefore, is necessary in applying precedents in one state to cases arising in another." 152 U.S. at 26.

Georgia adopted the common law in 1778 [Act of November 15, 1778, Watkins & Watkins, *Digest of the Laws of the State of Georgia,* 231-32 (1800)], under which title and ownership of the foreshore was in the State, and has never conveyed fee simple title to any of its tidelands. *State v. Ashmore,* 224 S.E.2d 334, 236 Ga. 401, *cert. den.*, 429 U.S. 830, 97 S.Ct. 90, 50 L.Ed.2d 93 (1976).

III.

The Equal Footing Doctrine

In 1787 before the Constitution was written, the Confederate Congress adopted an ordinance commonly known as the "Ordinance of 1787: The Northwest Territorial Government," which set up guidelines for the government of the northwest territory and for the admission of new states to be formed from it. It described principles and rights of the people in the territories, required that courts be set up with common law jurisdiction, and that the territorial government adopt such laws of the original states as might be necessary. It also provided for the establishment of states and their admission "to a share

in the Federal councils on an equal footing with the original States . . . ." Section 13.

Section 14 provided:

> "It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said Territory, and forever remain unalterable, unless by common consent, . . ."

These articles mandated that the people should always be entitled to "judicial proceedings according to the course of the common law." Art. II; that "the "navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free . . . ." Art. IV: and also mandated:

> ". . . such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government: *Provided,* the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles . . . ." Art. V.

The Ordinance was the forerunner of the Constitution adopted on December 17, 1787 and is regarded as part of the organic or fundamental law of this country. Many of the principles adopted in the Constitution and Bill of Rights were first outlined in this Ordinance.

Georgia, under a Cession Agreement dated April 24, 1802, ceded the land from which Congress on April 17, 1798 had established as the Mississippi Territory. This agreement incorporated the provisions of the Ordinance of 1787.

The Enabling Act of March 1, 1817 authorized the inhabitants of the western part of the Mississippi Territory to form a state "to be admitted into the Union upon the same footing with the original states, in all respects whatever."

The Resolution for the admission of Mississippi into the Union dated December 10, 1817, acknowledged that Mississippi had complied with all the principles of the compact between the original states in the Ordinance of 1787 and that the State was admitted into the Union "on an equal footing with the original states, in all respects whatever."

Thus, the Congressional Act admitting Mississippi into the Union acknowledged the common law to be the same as was recognized in the thirteen original states. Mississippi, as the first new coastal state admitted under the terms of the Ordinance of 1787, received the same common law *rights* to all tidelands, under the public trust, within its boundaries and, following a strict interpretation of the common law, gave up all rights to waters above the tide to the Federal Government for disposal to private individuals, with the proviso that the Mississippi River be kept as a public highway.

While all the new states had some form of equal footing clause in their Acts of Admission, in some the actual terminology was different, *e.g.*, Kentucky, admitted on February 14, 1791, "as a new and entire member of the United States of America"; Louisiana,[8] admitted in 1812, "on an equal footing with the original states, and for other pur-

[8] Louisiana was the first new coastal state admitted on April 8, 1812. Its Enabling Act dated February 20, 1811, did not contain any requirement that the *common law be adopted* but only that its constitution "shall be republican, and consistent with the constitution of the United States; . . . ." Section 3 (Emphasis added).

poses," with no requirement that it accept the common law.

The equal footing doctrine as established by the Ordinance of 1787 and the Acts of Congress under which new states were admitted into the Union guaranteed to them the same rights and privileges as the original states enjoyed as sovereign states. The original states which were coastal were entitled to own all the tidelands within their respective boundaries as trust lands.

Petitioners misconstrue the purpose of the equal footing doctrine. It calls for parity in political and sovereign rights[9] among the various states and does not require economic equality. It does nothing more, or less, than guarantee equal rights.[10]

It is also acknowledged that the original states reserved all their tidelands under the Tenth Amendment to the Constitution. *Pollard's Lessee v. Hagan*. Petitioners have not offered any proof that the original states did not

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[9] To say that for one state to receive more submerged lands than another would be unconstitutional under the equal footing doctrine is incorrect, as shown by this Court's reaction to the suit of *Alabama v. Texas* challenging the constitutionality of the Submerged Lands Act of 1953. The Court denied the motions for leave to file complaints, stating: ". . . Alabama and the defendant states were admitted into the Union 'upon the same footing with the original states, in all respects whatever,' . . . The requirement of equal footing does not demand that courts wipe out diversities 'in the economic aspects of the several States,' but calls for 'parity as respects political standing and sovereignty.' *United States v. Texas, supra,* at 716." *Alabama v. Texas,* 347 U.S. 272, 275 (1954).'

[10] And in *The Propeller Genesee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443, 453, 454 (1851), this Court stated: "The Union is formed upon the basis of equal rights among all the states . . . ; that is, a perfect equality in the rights and the privileges of the citizens of the different states not only in the laws of the general government, but in the mode of administering them."

reserve all their tidelands or that they transferred to the United States any of these sovereign lands. The Virginia Cession Agreement of 1784 and the Georgia Cession Agreement of 1802 ceded to the United States only the "waste and unappropriated" lands in the interior to be sold for the public benefit and did not include tidelands.

In *Pollard's Lessee,* the validity of a federal patent to tidelands in Alabama was at issue, described as "mud flats" along the river in the City of Mobile which were covered by high tide in 1819 when Alabama entered the Union. This Court stated that this was the first time it had been called upon to "draw the line that separates the sovereignty and jurisdiction of the government of the Union, and the State governments, over the subject in controversy." 44 U.S. at 220.

The Court noted that the original states had reserved their rights to tidelands from the United States and ruled that the new states were entitled to the same rights to the tidelands within their respective jurisdictions as the original states possessed. In so holding, the Court established the absolute title of the states to their tidelands. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 374 (1977)

Since Mississippi had entered the Union upon the same conditions as Alabama, the *Pollard* decision meant that Mississippi was vested with absolute title to its tidelands and the patents granted to the Cinque Bambini predecessors can have no validity insofar as they purport to convey tidelands.

In *Weber v. State Harbor Comm'rs.,* 85 U.S. (18 Wall.) 57, (1873) at pages 65, 66, the Court affirmed that the United States held the title to the soil under the tideweaters of San Francisco Bay (acquired from Mexico) in trust for the future state:

> "Upon the admission of California into the Union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, *all soils under the tidewaters* within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper . . . subject only to the paramount right of navigation over the waters . . . ." (Emphasis added).

Shively v. Bowlby, 152 U.S. 1 (1894), affirmed a decision of the Oregon Supreme Court that a congressional donation claim granted while Oregon was still a territory passed no title or right in lands below high water mark, as against subsequent deeds from Oregon. The lands in question were tidelands along the Columbia River.

The Court noted that the jurisprudence of Oregon is based on the common law and affirmed the assertion by the Supreme Court of Oregon that "from all this it appears that when the State of Oregon was admitted into the Union, the tidelands became its property and subject to its jurisdiction and disposal . . . ." 152 U.S. at 56.

The case of *Mann v. Tacoma Land Co.,* 153 U.S. 273 (1894) speaks to the heart of the issue in the case at bar. The property at issue consisted of mud flats, bare at low water, but nevertheless overflowed at high water from two to four feet deep. The property was part of the lands acquired from a Mexican treaty between the United States and Mexico which did not confirm Mexican grants of land.

The lands in *Mann, Id.,* were tidelands which the Plaintiff did not claim by any grant from the State of Washington nor by any act of Congress specifically grant-

ing him the lands. This Court at page 822 states its position as follows:

> "That the title to tide lands is in the state is a proposition which has been again and again affirmed by this court, some of the earlier opinions going so far as to declare that the United States had no power to grant to individuals such lands at any time, even prior to the admission of the state and during the territorial existence."

Citing *Shively v. Bowlby* and other cases, the Court went on to say that this question has been asked and answered many times, and the lower court decree was affirmed.

Borax Consolidated Ltd. v. City of Los Angeles, 296 U.S. 10 (1935) was a suit by the City of Los Angeles to quiet title to land claimed to be tideland on Mormon Island situated in what is now known as Los Angeles Harbor. The City asserted title under a legislative grant by the State. *Borax* claimed under a United States patent. The Court held that the City was entitled to a new survey to determine whether any part of the land was, in fact, tideland. In the words of this Court:

> *"The controversy is limited by settled principles governing the title to tidelands.* The soils under tidewaters within the original States were reserved to them respectively, and the State since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands as the original States possessed . . . This doctrine applied to tidelands in California." 296 U.S. at 15 (Emphasis added).
>
> * * * * *
>
> "It follows that if the land in question was tideland, the title passed to California at the time

of her admission to the Union in 1850. That the Federal Government had no power to convey tidelands, which had thus vested in a State, was early determined." *Id.* at 16.

IV.

The Navigability in Fact Test Applicable to Non-tidal Waters Has Never Replaced the Ebb and Flow Test of Ownership of Tidal Waters by the States

The use of the term "navigable in fact" as an additional meaning of "navigable" did not appear in American jurisprudence until the invention of the steamboat. In 1851, this Court in *The Propeller Genesee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443 (1851), amended the common law rule which limited the admiralty jurisdiction to tidal waters by extending such jurisdiction to waters above the tide which were commercially navigable. The word "navigable" was used in *Genesee Chief* to describe those waters above the tide that were capable of being passed over in ships or vessels for the purpose of admiralty jurisdiction. It had nothing to do with the common law use of "navigable" to describe those waters subject to the ebb and flow of the tide owned by the King. The Court emphasized that this decision related to jurisdiction only and stated that "the judgment we now give can disturb no rights of property . . . ." 53 U.S. at 459.

Petitioners state that "navigability in fact has become the *sine qua non* of the public trust doctrine." This is true only with reference to the federal public trust doctrine established by the courts after *Genesee Chief.* Following *Genesee Chief,* in 1870 in *The Daniel Ball,* 77 U.S. (10 Wall.) 557 (1870), this Court adopted a definition of

navigable in fact waters for extending admiralty jurisdiction to navigable in fact waters above tide. Since the admiralty courts already had complete jurisdiction of all tidewaters, there was no necessity for this definition to be retroactively applied to tidewaters.

Barney v. City of Keokuk, 94 U.S. 324 (1876), introduced into American jurisprudence the concept that navigable in fact waters above the tide should *also* belong to the states as a sovereign right. As this Court stated in *Corvallis,* p. 374, 375: "[*Barney*] *extended* the [*Pollard*] doctrine to waters which were nontidal but nonetheless navigble, consistent with its earlier extension of admiralty jurisdiction to such waters in *The Propeller Genesee Chief v. Fitzhugh,* 12 How. 443 (1852)." The Court "clearly articulated the rule that the States could formulate and modify, rules of riparian ownership as they saw fit." *Id.* at 379.

Thus, this Court expanded the common law public trust to include all navigable in fact freshwaters up to the point of high water mark. It should be noted that this test of public ownership was limited to waters above the tide. Petitioners have cited no decision of this Court which said that the "navigable in fact" test replaced the "ebb and flow" test for ownership of waters below the tide. The "navigable in fact" test has never been used in connection with tidewaters, either for ownership or admiralty.

Genesee Chief, Daniel Ball, and *Barney* laid the foundation for the new federal public trust doctrine under which the federal government held in trust for the future states the navigable in fact waters above the tide. While this Court in *Packer v. Bird,* 137 U.S. 661 (1891) and later cases concerning ownership of waters above the tide, adopted the *Daniel Ball* "navigability in fact" definition,

these cases have no bearing on this case because the lands involved herein are all below sea level and are controlled by the ebb and flow of the tide from the Gulf of Mexico.

McGilvra v. Ross, 215 U.S. 70 (1909), cited by Petitioners, concerned ownership of two navigable in fact lakes above the tide in the State of Washington. McGilvra claimed ownership under a federal patent granted while Washington was still a territory, and contended that ownership of the lakes must be determined by the common law rule because "when the patents were issued . . . 'the common law of England in relation to riparian ownership was in full force in the territory of Washington.'" The Court rejected this claim, saying that since *Genesee Chief* the common law rule as to private ownership of waters *above the tide* was no longer in effect.

Petitioners' interpretation of *McGilvra, Id.,* is entirely contrary to fact. The *McGilvra* Court referred to *Shively* and again reviewed all previous decisions regarding waters above the tide to show that the rule of ownership had been completely changed for such waters – and *only* for such waters – from private to public ownership. A close reading of *McGilvra* shows that the passage quoted by Petitioners – referred only to cases since *Genesee Chief* regarding ownership of waters above the tide.

This is the true meaning of the Court's reference to *Shively* in *McGilvra; Shively* was a tidewaters case, decided solely by the common law test of ebb and flow of the tide. The court reviewed all previous rulings concerning the ownership of tidelands as well as the meaning of "navigable waters," as including all tidelands under these decisions:

> "The new states admitted into the Union since the adoption of the Constitution have the same

> rights as the original states in the tidewaters, and in the lands below the high water mark, within their respective jurisdictions." 152 U.S. at 341.

With reference to the change in the common law doctrine as to ownership of waters above the tide, the *Shively* Court quoted from *Packer v. Bird,* 137 U.S. 669, 670:

> "As an incident of such ownership, the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the state, either to low or high water mark, or will extend to the middle of the stream." 152 U.S. at 44.

By using an erroneous interpretation of *McGilvra* and misunderstanding the legal meaning of the words "shore lands"[11] and "riparian,"[12] Petitioners conclude arbitrarily that the test of state ownership of tidelands is now navigability in fact. This is one more instance where Petitioners attempt to apply retroactively this Court's rulings regarding waters above the tide to waters below the tide. Neither *Shively* nor *McGilvra* support the validity of their conclusions.

Petitioners assert that "the ebb and flow" test never did have any place in determining state ownership of public

---

[11] *Shore Lands:* "Those lands lying between the lines of high and low water mark. Lands bordering on the shores of navigable lakes and rivers below the line of ordinary highwater." Black's Law Dictionary 1548 (4th Ed. 1969).

Shore: "Strictly and technically, lands adjacent to the sea or other tidal water." *Id.*

[12] *Riparian:* "Belonging or relating to the bank of a river; of or on the bank." *Id.* at 1490. "The term 'riparian' is applied to fresh water stream." H. Farnham, *The Law of Waters and Water Rights,* Section 63 (1904).

trust lands (p. 34 of Petitioners' brief), thus repudiating the unbroken line of decisions of this Court holding to the contrary. The right of Mississippi to all its tidelands, without limitation of any kind, rests on the common law, the public trust doctrine and the equal footing rule as interpreted by this Court.

Borax Consolidated Ltd. v. City of Los Angeles, 296 U.S. 10 (1935), decided by this Court twenty-six years after *McGilvra,* completely refutes Petitioners' argument that the test of state ownership of tidelands is "navigability in fact." *Borax* was decided solely on the basis of the common law "ebb and flow" test and this Court stated unequivocably that "if the land in question was tideland, the title passed to California at the time of her admission to the Union in 1850." 296 U.S. at 16.

As recently as 1984 this Court reaffirmed *Borax* in *Summa Corp. ex rel State Lands Commission,* 466 U.S. 198, 205 (1984):

> "The federal government, of course, cannot dispose of a right possessed by the State under the equal footing doctrine of the United States Constitution. *Pollard's Lessee v. Hagan,* 3 How. 212 (1845). Thus, an ordinary federal patent purporting to convey tidelands located within a state to a private individual is invalid, since the United States hold such tidelands only in trust for the state. *Borax Co. v. Los Angeles,* 296 U.S. 10, 15-16 (1935)

These decisions leave no doubt that the ebb and flow of the tide is still the test of state ownership of tidelands.

V.

The Submerged Lands Act

On May 22, 1953, Congress enacted the Submerged Lands Act, 43 U.S.C.A., 1301, *et seq.*, the expressed purpose of which was "to confirm and establish the titles of the States to lands beneath navigable waters within State boundaries." Congress codified the common law of this country as expressed in the decisions of this Court regarding ownership by the states of public trust waters.

Section 1311(a) sets forth the basic policy with respect to "lands beneath navigable waters within state boundaries, as follows:

> "It is determined and declared to be in the public interest that (1) *title to and ownership of the lands beneath navigable waters within the boundaries of the respective States,* and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law *be, and they are, subject to the provisions hereof, recognized, established, and vested in and assigned to the respective States* or the persons who were on June 5, 1950, entitled thereto under the law of the respective grantees, lessees, or successors in interest thereof; . . . ." (Emphasis added).

This section shows that "lands beneath navigable waters" were not being granted to the states as of 1953 but that Congress recognized and confirmed the pre-existing rights of the states in both tidal and nontidal waters.[13]

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[13] *See, Oregon ex rel State Land Board v. Corvallis Sand & Gravel Company,* 429 U.S. 363 (1977), footnote 4 at 371, in which Chief Justice Rehnquist commented:

In Section 1311(b) the United States released and relinquished to the state all right, title and interest which the United States had, if any, to these lands.

Section 1301(a) identifies three different categories of lands included within the definition of "lands beneath navigable waters." Only category (2)[14] is pertinent to the present case.

> "(a) The term 'lands beneath navigable waters' means –
>
> "(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters *that were navigable under the laws of the United States* at the time such State became a Member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;
>
> "(2) *all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide* . . . and
>
> "(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable

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". . . the Submerged Lands Act did not alter the scope or effect of the equal-footing doctrine. . . . The effect of the Act was merely to confirm the States' title to the beds of navigable waters within their boundaries as against any claim of the United States Government."

[14] *Tide-water:* "Water which falls and rises with the ebb and flow of the tide. The term is not usually applied to the open sea, but to coves, bays, rivers, etc." Black's Law Dictionary, 1652 (4th Ed. 1969).

Tideland: "Land between the lines of the ordinary high and low tides covered and uncovered successively by the ebb and flow thereof; land over which the tide ebbs and flows. *Id.*

waters, as hereinabove defined; . . . ." (Emphasis added).

Subsection (2) refers to all lands permanently or periodically covered by tidal waters as determined by the "ebb and flow" test. Under the common law at the time of the Revolution the only waters considered to be "navigable" were tidewaters and the only lands in the public trust in the original states were tidelands.

The language of the Act is clear and shows no attempt by Congress to replace the "ebb and flow" test with the "navigability in fact" test in tidelands. Thus, the Act is in complete agreement with all the decisions of this Court.

VI.

Reversing Mississippi's Title to the Tidelands in Controversy Which It Received Under the Equal Footing Doctrine Would Have a Devastating Impact on All the People of the State

From statehood in 1817 Mississippi has held its tidelands as a public trust for the common use of all the people. Since these lands could never be owned privately and legitimately, there would be no inequity against private owners who mistakenly believed that they owned them, but there would be a great impact on the rights of all the people in the State if Petitioners' claims are recognized as valid.

Throughout the years, beginning in 1857 with *Martin v. O'Brien,* 34 Miss. 21 (1857), whenever there has been any encroachment upon state-owned tidelands, the State has successfully asserted its sovereignty in the courts of the State. Petitioners' claim of ownership only became apparent when they granted oil and gas leases which included

state lands and came into conflict with oil and gas leases legally granted by the State Mineral Lease Commission.

The State did not wait 150 years to assert its title and is not trying to apply such title retroactively. Petitioners must be aware that their titles are based merely on donation grants affirmed by Acts of Congress in 1822 and 1830, which could convey no tidelands, and that their claims that their titles "stem from Spanish land grants" are fictitious. [Page 13 of Petitioners' brief]

In closing, Petitioners cite *Goodtitle v. Kibbe,* 50 U.S. (9 How.) 471, 478 (1850) and quote a few disconnected words, apparently to convey the impression that it would require a "very strong case indeed" for this Court to invalidate their patents to the tidelands in controversy. The situation in *Goodtitle v. Kibbe* was just the same as the case at bar.

There this Court had been asked to reverse *Pollard v. Hagan* in a case involving the same Act of Congress of 1836 and an inchoate Spanish grant dated December 12, 1809. This Court reaffirmed the right of Alabama to all lands below the ordinary high water mark of the tide and, in refusing to reverse *Pollard,* stated:

> "And it must be a very strong case indeed, and one where mistake and error had been evidently committed, to justify this court, after the lapse of five years, in reversing its own decision; thereby destroying rights of property which may have been purchased and paid for in the meantime, upon the faith and confidence reposed in the judgment of this court. But upon a review of the case, we see no reason for doubting its correctness, and are entirely satisfied with the judgment then pronounced." 50 U.S. at 477, 478.

We suggest that since 170 years have elapsed since Mississippi was vested with absolute ownership of all its tidelands, the case for reversal of its title must be more than "very strong." Petitioners have not made such a case.

CONCLUSION

For the foregoing reasons, the judgment of the Mississippi Supreme Court should be affirmed.

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No. 86-870

In The

Supreme Court of the United States

October Term, 1987

PHILLIPS PETROLEUM COMPANY and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM, U.S., INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The briefs of the two respondents and their supporting *amici*[1] err in two critical respects:

(1) They mistakenly assume that the mere presence of a tidal influence suffices to establish public trust ownership of lands beneath non-navigable and otherwise non-usable discrete little drainage streams.

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[1] In this reply brief, "R" refers to the certified record of the trial proceedings; "J.A.' refers to the joint appendix; "Miss.Br." refers to the merits brief of the respondent State of Mississippi; "Saga Br." refers to the merits brief of the respondent Saga Petroleum; "13 Br." refers to the *amici* brief of the thirteen original States; and "Cal.Br." refers to the *amici* brief filed by the State of California and ten other States.

(2) They erroneously assume that lands beneath discrete non-navigable drainage streams, which have no public purpose or usage and which lack relationship with a navigable stream, are "tidelands" within the meaning of the equal footing and public trust doctrines.

This reply brief addresses these two major errors. We begin, however, by further clarifying the physical characteristics of the underwater lands in issue. Many of the legal misconceptions that cloud the four opposing briefs stem from failure to examine or appreciate the true nature of these little drainage streams and bayous. Only the brief of the State of Mississippi makes any attempt to describe these waters, but that effort is flawed. Miss.Br. 6-10.

I

The lands in question lie beneath non-navigable drainage streams that lack any public use or interest.

The Mississippi Supreme Court premises its ruling on the conceded fact that the "forty-two plus acres" (Pet. App. 2a) of land still in issue lie beneath waters that are both (1) non-navigable in fact and (2) subject to the daily ebb and flow of tides. Such dual characteristics are particularly evident in the "eleven small drainage streams ranging in size from .44 acres to 9.966 acres" (Pet.App. 2a), streams that lie entirely within the interior of the privately owned uplands.

But acreage computation does not adequately describe these streams. They are of varying lengths, most of them very short and none more than a mile long. They are narrow, sharply winding, and shallow, varying in depth from 2 to 6 feet. R. 228. Mississippi's brief states that none of the streams bears any name. Miss. Br. 7. Some are vir-

tually unnoticeable when passing by their mouths, which can be obscured by the tall marsh grass that grows to the waters' edge. R. 226. Certainly, as is conceded, none of the streams is navigable or usable in the commercial sense. Only the smallest of boats can navigate the shallow streams for short distances; but the underwater debris often makes such journeys hazardous. R. 111, 226, 228.

The merits brief of the State of Mississippi asserts, for the first time in this proceeding, that "[i]n no sense of the word could they [the eleven streams] be described as 'drainage ditches.' " Miss.Br. 10. Any assertion that these streams are not "drainage" in character is impermissible and inaccurate. It is impermissible because it contradicts not only the facts of record (R. 223, 232) but the concurrent fact findings of the two courts below. The Chancery Court found these to be "interior drainage streams" (Pet.App. 41a), while the Mississippi Supreme Court described them as "eleven small drainage streams" (Pet.App. 2a). Such a factual determination cannot be questioned or relitigated before this Court. See *Egan* v. *Hart,* 165 U.S. 188, 189, 191 (1897); *Marshall Dental Mfg. Co.* v. *Iowa,* 226 U.S. 460, 461 (1913).

The unsupported assertion that these are not drainage streams or ditches is also factually inaccurate. The lower courts' "drainage" characterization reflects the physical fact that the streams are draining rain water and fresh water from the uplands. The flat elevation of this area makes for a slow moving drainage and a degree of brackishness from the backwash of the tides. But "drainage" is the only adjective to apply to these little streams. Indeed, in a geographical area where the annual rainfall is more than 60 inches,[2] the excess water falling on the adjoining

[2] The mean annual precipitation in the coastal region of Mississippi, where the lands in question are located, ranges from 60 to 65 inches, the average being 62 inches. Atlas of Mississippi 12 (Univ. Press of Miss., 1974).

soils naturally demands a run-off ditch or stream. That accounts for the development of these eleven little streams, a common phenomenon throughout nature.[3]

Nor can these drainage streams be deemed "arms of the sea," as Mississippi would have it. Miss.Br. 10. They are but little fresh water drainage tributaries slowly flowing into the navigable Jourdan River, which in turn flows into a true arm of the sea – Bay St. Louis. To treat the farthest inland reach of these tributaries, the point to which the Mississippi court's metaphorical toothpick under sail might reach (Pet.App. 12a), as the inner boundary or shore of the Gulf of Mexico, Bay St. Louis or the Jourdan River confounds geophysics and common sense. Particularly is that so when one realizes that the tidal influence observable in the drainage streams largely consists of fresh water that is backed up by the salt water tides of the Gulf.[4]

Mississippi also seeks, for the first time in these proceedings, to redefine and remake these little drainage streams into "tidewaters" and the soil beneath them into "tidelands." Miss.Br. 9-10. This effort is premised not on any facts of record or any determination by the lower courts, but upon dictionary definitions.[5] While the

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[3] Mississippi makes the amazing and undocumented statement that these waters "are all below sea level." Miss.Br. 10. If that were true, all these eleven drainage streams would be flowing backwards.

[4] The tidal influence in these eleven streams is created not only by the backwash of the salt water tides of the Gulf coast but by the prevailing winds and the amount of rain water draining off the lands at any given period. See R. 270, 289, 290.

[5] Mississippi relies solely on the definitions of "tidewater" and "tideland" in Black's Law Dictonary. Miss.Br. 6, n. 1; 34, n. 14. The terms are there defined generally as water that falls or rises with the ebb and flow of the tide, and as land that is covered and uncovered by the ebb and flow. But Mississippi chooses not to quote Black's further delineation of a "tideland" as constituting "that portion of the shore or beach covered and uncovered by the ebb and flow of ordinary tides."

Mississippi Supreme Court remarks early in its opinion that the underwater lands in issue "are arguably tidelands" (Pet.App. 1a), the court does not pursue that argument or premise its decision on any notion that these are true tidelands. Its ruling is that Mississippi holds fee simple title "to all lands naturally subject to tidal influence, inland to today's mean high water mark." Pet.App. 2a.

In any event, as will be demonstrated in Part III of this reply brief, neither the public trust nor the equal footing doctrine encompasses lands under discrete water bodies, not usable by the public in any manner that do not form part of the shore or coast of a navigable body of water, such as the Gulf. Mississippi's belated effort, by artful use of dictionary definitions, to transform "lands naturally subject to tidal influence" into "tidelands" beneath "tidewaters" is not acceptable. Tidal influence on a discrete non-navigable stream is simply not the equivalent of "tidewaters" or "tidelands" as those terms are used in public trust or equal footing jurisprudence.

Finally, it is significant that the State of Mississippi is unable to point to any facts of record showing that these little streams and bayous have any public or commercial use. It is conceded that they are non-navigable for any purpose. They are not public highways for commerce. They do not provide any public access to a navigable river or bay. They are simply not suited for public fishing, swimming or boating, and no such use has been made of them. Only on rare occasions has a solitary fisherman been observed. Pet.App. 41a; and see R. 113, 220, 225,

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Black's Law Dictonary, p. 1652 (4th ed. 1951), a definition continued in the 5th edition (1979) at p. 1329.

See also Webster's definition of a "tide" as "the alternate rising and falling of the surface of the ocean and of gulfs, bays, estuaries, and other water bodies connected with the ocean that occurs twice a day . . . ." Webster's Third New International Dictionary, p. 2390 (1981).

229. These waters benefit only the private owner of the uplands, draining excess rain water from his land and on occasion permitting a drink for his grazing cattle.

The respondent Saga Petroleum candidly asserts that Mississippi's only interest in these particular underwater lands is to lease them for oil and gas exploration "for the purpose of obtaining revenue and thereby benefiting the state's citizens." Saga Br. 16. Such a profit motive is not a respectable reason for a State asserting or obtaining a fee simple title to real estate at the expense of its citizen landowners. See *Packer* v. *Bird*, 137 U.S. 661, 671 (1891).

Nor is there any evidence in this record that these little streams and bayous had any public usage whatever in 1817, when Mississippi was admitted to the Union. Then as now, these were naturally formed streams whose primary if not sole purpose or use was and is to drain excess rain water off the uplands. In that sense, and in any sense, these streams were and are nothing more than the interior drainage system of the uplands.

II

Mere presence of a tidal influence on a discrete non-navigable stream does not establish public trust ownership.

The respondents and their *amici* seek to make tidal ebb and flow the sole requirement of, and justification for, public trust ownership of land beneath discrete streams that are neither navigable nor otherwise susceptible to public enjoyment or usage. Such a position confounds all established precedents. And it ignores the public policies that underlie and justify the public trust doctrine.

It is long established that the sovereign has trust ownership of the lands under navigable waters, while private

riparian owners have title to the lands under non-navigable waters. See *The Royal Fisheries of the Banne*, Davies Rep. 149 (circa 1604) (the King owns navigable rivers only, leaving title "to every other river not navigable" to the adjoining land owners); *Montana* v. *United States*, 450 U.S. 544, 551 (1981) ("owners of land riparian to *non-navigable* streams may own the adjacent riverbed, [but] conveyance by the United States of land riparian to a *navigable* river carries no interest in the riverbed").

Just last Term, this Court summarized the history of the rule that only lands under navigable waters come within the equal footing doctrine, as well as the public trust doctrine. In *Utah Division of State Lands* v. *United States*, 107 S.Ct. 2318, 2320, 96 L.Ed.2d 162, 169 (No. 85-1772, June 8, 1987),[6] of the Court wrote:

> Under English common law the English Crown held sovereign title to all lands underlying navigable waters. Because title to such land was important to the sovereign's ability to control navigation, fishing and other commercial activity on rivers and lakes, ownership of this land was con-

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[6] Justice White's dissenting opinion in the *Utah* case agrees that "A State obtains title to the land underlying a navigable water upon its admission to the Union . . ." 107 S.Ct. at 2327, 96 L.Ed.2d at 177. See also Justice White's opinion for the Court in *Block* v. *North Dakota*, 461 U.S. 273, 277 (1983).

Although the *Utah* decision was rendered a month before the four opposing merits briefs were filed, only Mississippi's brief cites or mentions the decision. While quoting some of the above language from the majority opinion, the Mississippi brief does not analyze, distinguish or recognize the significance of this Court's most recent articulation of the historic fact that only "land under navigable waters" was held in public trust by the English Crown, or by the thirteen colonies, or by the original thirteen States, or by any State subsequently admitted to the Union. Miss.Br. 19-20.

> sidered an essential attribute of sovereignty. Title to such land was therefore vested in the sovereign for the benefit of the whole people. See *Shively* v. *Bowlby*, 152 U.S. 1, 11-14 (1894). When the thirteen colonies became independent from Great Britain, they claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown. *Id.*, at 15. Because all subsequently admitted States enter the Union on an "equal footing" with the original thirteen States, they too hold title to the land under navigable waters within their boundaries upon entry into the Union. *Pollard's Lessee* v. *Hagan*, 3 How. 212 (1845).

Thus emerges the decisive point in this case: When Mississippi entered the Union in 1817 it acquired sovereign trust title only to "land under navigable waters," thereby achieving equal footing with the original thirteen States. Obviously excluded from this public trust was land under non-navigable waters. And since it has been clear since at least 1774, when Lord Mansfield delivered his opinion in *Mayor of Lynn* v. *Turner*, 1 Cowp. 86, 98 Eng. Rep. 980, 981 (K.B. 1774), that the mere flowing and reflowing of the tide does not make a non-navigable river navigable, Mississippi could not have acquired public trust dominion in 1817 over the non-navigable little drainage streams and bayous at issue in this case.

The conclusion is confirmed by the public policy underlying the public trust doctrine, a policy that makes sense only as to navigable waters. As *Packer* v. *Bird*, 137 U.S. 661, 667 (1891), explained, it is "the susceptibility [of navigable waters] to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or the soils under them." In other words, sovereign ownership of lands un-

der navigable waters is essential to "the sovereign's ability to control navigation, fishing and other commercial activity" on those waters. *Utah Division of State Lands* v. *United States, supra.*

Since non-navigable waters, like the ones in question, are not susceptible to use as highways of commerce, there is no reason or policy that justifies impressing public trust ownership on them. And since there is no evidence that the streams were any more navigable in 1817, Mississippi's statehood year, non-navigability is enough to dispose of this case and to reverse the judgment below.

Indeed, public navigability and commerce have always been the hallmarks of this nation's public trust concerns, as well as those of the common law and of the thirteen colonies that became the thirteen original States. Consider the following highlights of American public trust history:

(1) As we demonstrated in our main brief (pp. 19-23), "little streams and rivers that are not a common passage for the king's people" were always considered subject to private ownership in common law England. Royal ownership was confined to those rivers, including those subject to the tide, that were "of common or publick use for carriage of boats and lighters." See, e.g., Lord Hale's treatise, *De Jure Maris,* reprinted in S.A. Moore, *A History of the Foreshore,* pt. 1 at 374 (1888); and see *Shively* v. *Bowlby*, 152 U.S. 1, 11-14 (1894).

That ownership distinction between navigable and non-navigable streams was never questioned by any of the colonial courts or those of the original thirteen States. None of the cases cited in the *amici* brief of the thirteen original States (pp. 7-23) is to the contrary, as we demonstrate in the appendix to this brief (*infra,* p. 1a) and as the Court demonstrated in its own case law survey in *Shively,* 152 U.S. at 14-26.

(2) Congress, in authorizing the formation of new territories and States, has always emphasized the navigability of the waters that must remain free common highways of commerce. Thus, as noted in *Shively,* 152 U.S. at 33, the Northwest Ordinance of 1787 decreed that "the navigable waters leading into the Mississippi and St. Lawrence . . . shall be common highways, and forever free [to the inhabitants and all citizens of the United States]". 1 Stat. 50. *Shively* also took special note of the congressional authorization for the formation of the State of Mississippi, which declared that "the river Mississippi, and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, shall be common highways, and for ever free." Act of March 1, 1817, 3 Stat. 349. That statute is the best evidence we have of the general understanding of the public trust doctrine in 1817, when Mississippi entered the Union. The only public concern was in preserving the navigable streams as common highways of commerce. In the 1817 era, Congress expressed no concern whatever as to non-navigable waters that were tidally influenced; nor was there any reference to tidal ebb and flow as the measure of navigability.

(3) In *Propeller Genesee Chief* v. *Fitzhugh,* 53 U.S. (12 How.) 443, 454-455 (1851), the Court recognized that confusion had arisen from the English rule that seemed to equate public or navigable waters with tidewaters subject to ebb and flow. But the Court expressly rejected ebb and flow as the test of a navigable public stream, particularly for federal admiralty purposes in inland states with no tidally influenced navigable rivers. In so doing, the Court emphasized that it is the public or navigable character of the river that is crucial, not its tidal characteristic.

(4) That point was made even clearer in *Illinois Central Railroad* v. *Illinois,* 146 U.S. 387, 436 (1892). The Court there wrote: "So also, by the common law, the doctrine of

the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England. . . . The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment."

(5) The seminal case in American public trust jurisprudence is *Shively* v. *Bowlby*, 152 U.S. 1, 49, 58 (1894). After a thorough survey of the public trust doctrine, the Court concluded that States receive in trust "the lands under navigable waters" for "the public purposes of navigation and fishery." While the *Shively* opinion frequently speaks of "lands under tide waters" as being within the public trust, it speaks only of those tide waters that are "of great value to the public for the purposes of commerce, navigation and fishery." 152 U.S. at 57. There is no indication that the Court considered "tide waters" to include non-navigable discrete streams that do not serve to define the inner reach of a navigable body of water.[7] See Part III of this reply brief.

(6) In *McGilvra* v. *Ross*, 215 U.S. 70, 78 (1909), the Court commented that the ebb and flow test "has had no place in American jurisprudence since the decision [in *Genesee Chief*], and is therefore no test of riparian ownership." But, as we have seen, ebb and flow has never by itself been a definition of public or navigable highways of commerce, the core of the public trust and equal footing

[7] As explained in *McGilvra* v. *Ross*, 215 U.S. 70, 79 (1909), "The *Shively* case was concerned with shore lands within the ebb and flow of the tide." *Shively* itself states that it concerns "the title in certain lands below high water mark in the [navigable] Columbia River in the State of Oregon." 152 U.S. at 9.

doctrines. *McGilvra* simply reiterates the historic doctrine that the public trust relates only to "the administration and disposition of the sovereign rights in navigable waters, and in the soil under them," as of the time a State enters the Union. 215 U.S. at 79.

McGilvra also emphatically states that *Shively*, which is a "tidewater" or "shore land" case, decided that the term "navigable waters" as there used "meant waters which were navigable in fact" and that such definition of navigability in a tidewater or shore land context "was not inadvertent or unnecessary." 215 U.S. at 78. See Part III of this reply brief, *infra*.

(7) It bears repetition that *Packer* v. *Bird*, 137 U.S. 661, 667 (1891), holds that the exclusion of private ownership rights in underwater soils is justified only to the extent that the waters are navigable or "susceptible of being used as highways of commerce in the ordinary modes of trade and travel on water." If the waters are of that nature, then "the proprietorship of the beds and shores . . . properly belongs to the States by their inherent sovereignty." *Barney* v. *Keokuk*, 94 U.S. 324, 338 (1876).

The conclusions to be drawn from the foregoing account are: (1) the public trust ownership of underwater soils has always been confined to soils under navigable waters, which by nature include the non-navigable shores and coasts thereof up to the mean high water mark; (2) public trust ownership has never been deemed to include soils under discrete non-navigable waters that are not susceptible or related to any public usage or concern. Thus the State of Mississippi did not acquire the soils under the discrete drainage streams and bayous here in question when it entered the Union in 1817.

III

Lands beneath discrete non-navigable drainage streams are not "tidelands" for public trust purposes.

Exploiting the fact that tides ebb and flow over the lands in question, the respondents and their supporting *amici* seek to transform this into a public trust "tidelands" case. They even restructure the single Question Presented to this Court to make it appear that the sole issue is whether, upon entering the Union, a State acquires title to "all tidelands within its boundaries."[8]

Such an effort is misplaced. It ignores the critical fact that these lands lie beneath discrete drainage streams that are not navigable or otherwise usable by the public. It ignores the long history of the public trust doctrine, a doctrine "founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment." *Illinois Central Railroad* v. *Illinois,* 146 U.S. 387, 436 (1892). It ignores the established proposition that shore lands and lands under tidewaters are components of the public trust doctrine only to the extent that they relate to "the public purposes of navigation

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[8] In opposing certiorari, the respondent State of Mississippi repeated the exact same Question Presented that appears in the petition for writ of certiorari: "Whether, at the time of Mississippi's statehood in 1817, *the lands under the non-navigable but tidally influenced inland waters* were conveyed by the United States to Mississippi as part of the state-owned public trust." [Emphasis added]. Petitioners, but not the respondents and their *amici,* have accordingly addressed that question in their main brief before this Court.

The Question Presented in Mississippi's merits brief is this: "At the time Mississippi entered the Union in 1817, under the common law and on an equal footing with the original states, did the public trust lands conveyed by the United States to Mississippi include *all tidelands within its boundaries.*" [Emphasis added].

and fishery." *Hardin* v. *Jordan,* 140 U.S. 371, 381 (1891).

Petitioners have no quarrel with the proposition that "tidelands" may be a component of the public trust doctrine. But that proposition is not in issue in this case. The single Question Presented to this Court involves not tidelands but lands under discrete inland drainage streams that have none of the public or physical characteristics of tidelands. Most of the "tidelands" arguments in the four opposing briefs are thus irrelevant. See also the appendix hereto, *infra,* p. 1a, which analyzes the cases supporting those arguments.

"Tidewaters" and "tidelands" have played a somewhat confusing role in public trust jurisprudence. Originally, those terms reflected an erroneous American notion that the common law equated tidal ebb and flow rivers with public navigable rivers. That notion, along with the ebb and flow test of navigability, was roundly repudiated in *The Genesee Chief,* 53 U.S. (12 How.) at 455.

Later, but without precisely defining the terms, the Court began referring to sovereign dominion over "tidelands" and "tidewaters." *E.g., Shively* v. *Bowlby,* 152 U.S. at 49, 57. But such references appear only in situations where there is a clear public interest in, or usage of, the tidelands or tidewaters. If the lands or waters themselves are navigable, their public trust implications are obvious. If the lands or waters are non-navigable, their public trust character must derive from the navigable body of water to which they are in some way related.

In the latter context, the Court uses these terms to describe the inner reach of the shore or coast of a navigable body of water. In that situation, the tidal shoreline is endowed with a public trust interest by virtue of a public need to gain access to the more navigable or usable portions of the body of water. Thus in *Pollard's*

Lessee v. *Hagan,* 44 U.S. (3 How.) 212, 230 (1845), in volving lands over which tides ebbed and flowed, the Court imposed a public trust on the lands precisely because they constituted "shores of navigable waters." As such, the lands were useful to the public in facilitating an approach to the navigable Mobile River. See also *Baer* v. *Moran Brothers Co.,* 153 U.S. 287, 288-289 (1894) (public title to tidelands recognized because lands usable "in facilitating approach to the navigable waters from the upland"); *Massachusetts* v. *New York,* 271 U.S. 65, 92-93 (1926) ("seashore" belongs to public because it gives "access to the sea").

When this Court speaks of the public trust implications of "tidewaters" or "tidelands" it speaks of waters and lands that (1) are subject to the ebb and flow of the tide, and (2) form part of the coast or shore of, and are related to, some navigable body of water. *E.g., Shively* v. *Bowlby,* 152 U.S. 1 (1894) (tidewaters of the navigable Columbia River); *Knight* v. *U.S. Land Association,* 142 U.S. 161 (1891) (tidelands forming part of the shore line of San Francisco Bay); *Weber* v. *Board of State Harbor Commissioners,* 85 U.S. (18 Wall.) 57 (1873) (soil under the tidewaters of San Francisco Bay); *Mann* v. *Tacoma Land Co.,* 153 U.S. 273 (1894) (mudflats along the shore of a Puget Sound bay).[9]

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[9] Some but not all the opposing briefs assert either that the *Mann* decision "speaks to the heart of the issue in the case at bar" (Miss.Br. 26) or that "[t]he *Mann* decision alone should be dispositive of this case" (Cal.Br. 13). Neither assertion is correct. The California brief quotes from the argument of counsel, not from the opinion of this Court, to the effect that the tidally flowed mudflats in question "were presumably by the unnavigable waters of some bay or inlet of the waters of Puget Sound" (153 U.S. at 278). But the opposing counsel in *Mann* seemingly argued that the mudflats were located "upon the shores of navigable waters" (38 L.Ed at 717), which seems likely since this was a "wharfing out" case.

The Court's treatment of tidelands is consistent with the geophysical definition of the term. Shalowitz, the leading authority on tidelands and seashores, defines "tidelands" as land, covered and uncovered by the tide, that lies in "the zone between the mean high-water line and the mean low-water line along a coast, and is commonly known as the 'shore' or 'beach.' " Justice Blackmun's dissent in *Kaiser Aetna* v. *United States,* 444 U.S. 164, 183 (1979), defines a tidal shoreline in a slightly different manner: "The ebb and flow of the tide defines the geographical, chemical, and environmental limits of the three oceans and the Gulf that wash our shores. Since those bodies of water in the main are navigable, they should be treated as navigable to the inner reach of their natural limits."

As thus put in their proper coast or shore context, tidal water and the underlying soils may embody certain other characteristics that may superficially seem inconsistent with imposing public trust status on them in the name of navigability. First, tidewaters themselves are often non-

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The *Mann* Court did not resolve this factual dispute, treating the mudflats as tidelands overflowed by the waters of a Puget Sound bay. But *Mann* must be read in conjunction with a companion decision that follows the *Mann* ruling, *Baer* v. *Moran Brothers Co.*, 153 U.S. 287 (1894). In *Baer* the Court treated very similar tidally flowed mudflats "as a part of the shore or tide lands" that were described as "adjacent to the waters of Puget Sound." The Court concluded that the mudflats in issue were strictly within the definition of "tidelands" since they "may be used in facilitating approach to the navigable waters from the upland." 153 U.S. at 288-289.

[10] A.L. Shalowitz, Shore and Sea Boundaries, Vol. 1, appendix, p. 318 (1962). Mr. Shalowitz was formerly special assistant to the Director, United States Coast and Geodetic Survey, Department of Commerce. See also L.A. Teclaff, Water Law in Historical Perspective, 293 (1985).

navigable. But that only reflects the physical fact that all navigable waters tend to have non-navigable shores, coasts, beaches, or boundaries. Second, non-navigable tidelands are usually subject to the ebb and flow of the tide. That means only that the inner boundary of the navigable body of water is to be measured by the mean high water mark on the tidal shoreline.

In sum, public trust dominion over navigable waters extends inward to the mean high water mark of their banks or coasts, much of which, when separately considered, may be non-navigable. That does not mean, of course, that every drainage ditch or stream in which the tide ebbs and flows, nor every small creek in which a fishing skiff or gunning canoe or "toothpick under sail" can float at high water, is a navigable highway or marks the inner boundary of the nearest navigable body of water. See *The Montello,* 87 U.S. (20 Wall.) 430, 442 (1874).

The opposing briefs grieviously err in assuming that a tidal influence on discrete inland drainage streams transforms the underlying soils into part of the shores washed by the Jourdan River or any other navigable body of water. Those soils and those streams certainly do not define the geographic, chemical or environmental limits of any navigable water. Nor are such soils and streams susceptible to any kind of public navigation or other usage and enjoyment. They do not facilitate access to any river, bay or Gulf.

The respondents leave unanswered the following questions: What interest or use does the public have in the discrete little drainage streams here at issue?[11] How can

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[11] It is enough, then, that the underwater lands in question are not navigable in fact and do not form any meaningful part of a navigable body of water. See *Toledo Liberal Shooting Co.* v. *Erie Shooting Club,* 96 Fed. 680 (C.C.A. 6, 1898) (shallow marshy creek opening in-

private ownership of the underwater lands encroach upon or interfere with any public use or enjoyment of such non-navigable streams? How can private ownership burden public access to any navigable body of water? What is the navigable body of water whose natural limit or inner reach is measurable by the mean high tidal mark on these little tributaries? Are we to meander the shoreline of some navigable body, such as the Jourdan River or the Gulf of Mexico, as far up its tributaries as the tide will carry a toothpick under sail? Cf. *Knight v. U.S. Land Association,* 142 U.S. 161 (1891).

Respondents' reliance on the outmoded ebb and flow test provides no satisfactory answers to those questions. Tidal influence alone does not suffice as a reason for applying the public trust doctrine. As the Court observed in *Illinois Central,* 146 U.S. at 426, the doctrine with respect to lands under tidewaters

> . . . is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable. . . . The doctrine is founded on the necessity of preserving to the public the use of navigable waters from private intereference and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide.

Finally, this Court long ago disposed of the contention of the thirteen original States (13 Br. 27-29) that each new State, upon entering the Union, has sovereign authority to define both the nature and the physical extent of

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to Lake Erie, a creek incapable of sustaining commerce or any other public use, held to be private property); *United States* v. *Oregon,* 295 U.S. 1, 16-24 (1935) (non-navigable swamp waters held not to be part of public trust dominion). Cf. *United States* v. *Turner,* 175 F.2d 644, 647 (5th Cir. 1949), *cert. denied,* 338 U.S. 851 (1949).

sovereignty over trust shorelands, at least to the extent that the original thirteen States had that authority. The nature and the extent of sovereign title acquired upon a State's entry into the Union are the very essence of the federal question here at stake. The constitutional principle of the equality of the States, known as the equal footing doctrine, demands that these public trust matters be determined by a uniform federal rule, rather than turning on varying local rules that "would give the Constitution a diversified operation where uniformity was intended." *United States* v. *Holt State Bank,* 270 U.S. 49, 567 (1926); and see *United States* v. *Utah,* 283 U.S. 64, 75 (1931); *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U.S. 77, 87-88 (1922).

[12] *Cf. Wisconsin* v. *Trudeau,* 139 Wis.2d 91 (1987), presently pending before this Court on petition for certiorari. The first question presented in that petition is: "Can the State of Wisconsin take title to non-navigable wetlands under the public trust doctrine simply because the wetlands drain into water courses that, in turn, drain into a navigable lake?"

CONCLUSION

For the foregoing reasons, supplementing those in petitioners' main brief, the judgment of the Mississippi Supreme Court should be reversed and the case remanded for further appropriate proceedings.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1987

No. 86-870

PHILLIPS PETROLEUM COMPANY and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM, U.S., INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

REPLY BRIEF APPENDIX

The *amici* brief of the thirteen original States presents a review or summary of the "original State laws and decisions . . . with an eye towards establishing what shorelands they reserved at the time the Constitution was adopted." 13 Br. 5-6. This appendix analyzes that state-by-state summary (13 Br. 6-24) with an eye towards demonstrating that none of the early State decisions or laws cited in that summary dealt with the problem in this case – i.e., the public trust ownership of discrete non-navigable inland streams that, while tidally influenced, reflect no public usage or interest. All the cases and laws cited in that *amici* brief involve either navigable waters or the non-navigable shorelands of navigable bodies of water – geophysical factors not here involved.

Cases and laws cited in amici brief	Petitioners' comments
MASSACHUSETTS	
1. *Commonwealth* v. *Charlestown*, 18 Mass. (1 Pick.) 180, 182 (1822), cited for proposition that the Massachusetts Bay Colony, prior to a 1641 ordinance, abided by the English common law of shorelands to the effect that "all arms of seas, coves, creeks, etc., where the tide ebbs and flows, are the property of the sovereign." 13 Br. 6.	1. *Charlestown* actually stated that, while by the common law the sovereign's title extended to all places where the tide ebbs and flows, whether such places are navigable or not, "it is probable the usages of our country have given a reasonable limitation to this doctrine, confining the public right to what may be of public use; so that in many little creeks into which the salt water flows, but which are incapable of being navigated at all, private property may be maintained. This is undoubtedly the case with many of the creeks which run through our extensive marshes . . ." 18 Mass. at 186.
2. The 1641 ordinance "granted to adjacent upland owners title to the shore down to the mean low tide mark or one hundred rods . . . from the mean high tide mark, whichever was less. . . . Public rights to fishing, fowling, and navigation in the intertidal zone were, however, reserved from the grant. *Commonwealth* v. *Alger*, 61 Mass. (7 Cush.) 53, 67-68 (1851)." 13 Br. 6.	2. The *Alger* case does not address ownership; it only concerns public use. The public use of shorelands is irrelevant to the issue of who owns the non-navigable discrete inland waters that are tidally influenced.

3. "The Commonwealth's dominion over the public rights in tidal waters is not dependent on whether the waters are navigable-in-fact. See *Commonwealth* v. *Vincent*, 108 Mass. 441, 447 (1874)." 13 Br. 7.	3. The *Vincent* case stated only that the Commonwealth has power to regulate fishing rights both in tidewaters and in non-tidal "great ponds." It does not otherwise discuss property ownership or dominion. See 108 Mass. at 447. In *Rowe* v. *Granite Bridge Corp.*, 38 Mass. (21 Pick.) 344 (1838) – a case not cited by the *amici* brief – Chief Justice Shaw wrote that "It is not every ditch, in which the salt water ebbs and flows, through the extensive salt marshes along the coast, and which serve to admit and drain off the salt water from the marshes, which can be considered a navigable stream. Nor is it every small creek, in which a fishing skiff or gunning canoe can be made to float, at high water, which is deemed navigable. But in order to have this character, it must be navigable to some purpose, useful to trade or agriculture." 38 Mass. at 347. [Quoted by this Court in *The Montello*, 87 U.S. (20 Wall.) 430, 442 (1874)].

NEW HAMPSHIRE

4. "In New Hampshire, '[i]t is well established law' that 'tide waters are public waters. As such they are within the power of the Legislature to make such laws as the public good may require.' *Sibson* v. *State*, 110 N.H. 8, 10, 259 A.2d 397, 399 (1969)." 13 Br. 7.	4. *Sibson* concerns the State's right to regulate the use of privately owned marshland. It does not consider the question of ownership, other than conceding the private ownership of the marshland at issue.
5. "While navigability-in-fact is the appropriate test to determine whether freshwater lakes and streams are public waters, since New Hampshire's earliest days the action of the tide has furnished 'a convenient means of locating the boundary of the largest reservoir of public water.' *Concord Manufacturing Co.* v. *Robertson*, 66 N.H. 1 at 5, 25 A. 718 at 723 (1889)." 13 Br. 7-8.	5. The *Robertson* case holds that "navigable water" means "all such waters as are actually navigable, whether fresh or salt." 66 N.H. at 10, 25 A. at 728. Although New Hampshire courts have never addressed the ownership of non-navigable waters, a consistent application of New Hampshire's navigability test of public waters would lead to private ownership of non-navigable waters, however tidally flowed.

RHODE ISLAND

6. "Rhode Island case law consistently establishes that title to shorelands below the high water mark, and subject to the ebb and flow of the tide, lies in the State. 'In this state, at common law, the fee of the soil in tide waters below high water-mark is in the state.' *Bailey* v. *Burges*, 11 R.I. 330, 331 (1876); [additional citations omitted]." 13 Br. 9.	6. But Rhode Island case law is silent on the subject of ownership of non-navigable waters subject to tidal influence. The reference to the *Bailey* case in 13 Br. in terms of "shorelands" and "tide waters" reflects the *amici* confusion of those terms with discrete non-navigable waters. *Bailey* and the other cited cases all concern navigable waters.

(1876); [additional citations omitted]." 13 Br. 9.

the other cited cases all concern navigable waters.

7. "'The public rights secured by this trust are the rights of passage, of navigation and fishery, and these rights extend . . . to all land below high water unless it has been so used, built upon or occupied, as to prevent the passage of boats, and the natural *ebb and flow of the tide.*' (Emphasis added). *Allen* v. *Allen*, 19 R.I. at 116; *Jackvony* v. *Powel*, 67 R.I. at 226." 13 Br. 9.

7. The *Allen* case involved a trespass on lands between high and low tide bordering a navigable body of water, while *Powel* concerned the public's right to use the sea shore. Neither case decided ownership. They were limited to consideration of the public use of concededly public lands.

8. "The fact that waters adjacent to the shoreland are or are not navigable has never been a requisite criteria for determining what tidelands of Rhode Island are held by the State in trust." 13 Br. 10.

8. But "waters adjacent to the shoreland" are not in issue in the instant case. Shores of navigable waters are usually state-owned and obviously cease to be navigable-in-fact in the shallow shore waters.

No case cited in 13 Br. indicates that Rhode Island has ever laid title claim to discrete non-navigable little streams that are tidally influenced

CONNECTICUT

9. 'The title of the king, *prima facie*, to all ports and arms of the sea to high water mark, and to the soil thereof, has long been established law; and . . . it is settled, that he may grant the property of the soil be-

9. In *East Haven*, the court simply ruled that the Crown could grant title to navigable waters. The case concerned a navigable river, and did not purport to decide whether discrete non-navigable but tidally in-

tween high and low water mark to a subject or corporation.' *East Haven* v. *Hemingway*, 7 Conn. 186, 198 (1828)." 13 Br. 10.

fluenced waters could be publicly owned.

10. "Adoption of the English common law regarding public ownership of all lands below 'high water mark' has been continually reaffirmed in Connecticut case law. 'The doctrine of the common law is, that the right to the soil of proprietors of land on navigable rivers extends only to high water mark; all below is *publici juris* – in the king, in England. That is the law in Connecticut; for we have no statute abrogating it.' *Chapman* v. *Kimball*, 9 Day 38, 40 (1831)." 13 Br. 10.

10. *Chapman* also declared (9 Day at 40-41): "A distinction is always maintained between rivers navigable and those not navigable. – Of the former the public alone has right; – of the latter, individuals may, and generally do own the same right as over other real estate."

11. "Within the context of colonial times, navigable waters as discussed in Connecticut case law referred to tidal influence rather than navigability-in-fact," citing *Adams* v. *Pease*, 2 Conn. 481, 484 (1818).

11. The *Adams* case held that the riparian owner of a navigable river not tidally influenced has the exclusive right of fishing. The court's equating of navigability with tidal influence cannot be construed as deciding ownership of non-navigable ebb and flow waters – an issue not before the *Adams* court.

NEW YORK

12. "As early as 1829 an appellate court of New York held that the navigable rivers and arms of the sea where the tide regularly ebbs and flows belong to the people. *Lansing* v. *Smith*, 4 Wend. 9 (1829)." 13 Br. 12.

12. *Lansing* concerned the rights of a riparian owner as the grantee of land between the high and low tide on the Hudson River. The case did not consider, nor decide, the rights of riparian owners to land under non-navigable tidal waters.

13. "It is also well established in New York 'that a conveyance by a governmental agency of land fronting on a navigable body of water conveys title only to the high water line.' *Dolphin Lane Association* v. *Town of Southampton*, 72 Misc. 2d 868, 882, 339 N.Y.S. 2d 966, 981 (1971)." 13 Br. 12.

13. The *Dolphin Lane* case concerned title to the tidally influenced Shinnecock Bay. Title thereto was determined on the basis of actual navigability rather than on tidal influence. The court said:

"The defendants proved that the Shinnecock Bay was tidal in 1818 and thus would meet the definition of navigability which was in use *prior to the Revolution* . . . This pre-revolutionary criteria for determining navigability evidently was not followed by the Courts of this State as indicated by . . . *Roberts* v. *Baumgarten*, 110 N.Y. 380 at page 1383, 18 N.E. 86 at page 97 . . . .

"The defendants also proved that Shinnecock Bay was 'navigable in fact,' and thus met the present criteria followed by our Courts to determine the navigability of a body of water." (citations omitted; emphasis ad-

ded). 339 N.Y.S. 2d at 980-981.

Thus navigability-in-fact is the "present criteria" for determining title in New York.

14. "'The foreshore, or land under the waters of the sea and its arms, between high and low-water mark, is subject, *first*, to the *ius publicum* — the right of navigation, . . .' *Tiffany* v. *Town of Oyster bay*, 234 N.Y. 15, 20, 136 N.E. 224, 225 (1922)." 13 Br. 12.

14. *Tiffany* involved a title dispute to lands below high tide on Oyster Bay that had been unlawfully filled by the riparian owner. The law of the "foreshore" has little or no bearing on the issue in the instant case.

15. "The authority of the State of New York to convey land under the tide waters is accordingly limited. 'The title of the state to the seacoast and the shores of tidal rivers is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign right, and it has frequently been said that a trust is engrafted upon this title for the benefit of the public of which the state is powerless to divest itself.' *Coxe* v. *State*, 144 N.Y. 3965, 405-406, 39 N.E. 400, 402 (1895)." 13 Br. 12-13.

15. *Coxe* referred only to state title to the seacoast and the shores of tidal navigable rivers. *Coxe* has no relevance to the question in the instant case, i.e., whether the state acquires public trust title to a discrete non-navigable stream that forms no shore or coast of a navigable body of water.

NEW JERSEY

16. "Between 1804 and 1851, there were numerous conveyances by the Legislature

16. This statement proves nothing. The fact that the tidelands conveyed were not

of State tidal lands. In each instance the lands conveyed were described either originally, or at the time, as being 'under water.' In no case were the lands described as 'navigable.' " 13 Br. 14.

denominated "navigable" does not prove that the State was claiming those that were non-navigable.

17. "An early assertion of ownership of the State of New Jersey to the beds of non-navigable waters led to the decision of this Court in *Martin* v. *Lessee of Waddell*, 41 U.S. 367 (1842). The introduction to *Martin* notes that the jury 'found the premises in dispute are situated beneath the waters of the Raritan River and Bay, where the tide ebbs and flows,' without any reference to its navigability. *Martin* v. *Waddell*, 41 U.S.at 368." 13 Br. 15.

17. The brief of the thirteen original States (13 Br. 15) errs in referring to a jury finding in *Martin* that the land in question lay beneath the Raritan River and Bay, where the tide ebbs and flows, "without any reference to its navigability." There is no such finding in the so-called "introduction" at page 368; the headnotes on that page make numerous references to "navigable waters." More importantly, Chief Justice Taney's opinion for the Court states that the jury found "that the land claimed lies beneath the navigable waters of the Raritan river and bay, where the tide ebbs and flows." 41 U.S. at 407.

Moreover, *Martin* v. *Waddell* was not the culmination of an "early assertion of ownership of the State of New Jersey to the beds of non-navigable waters." As Chief Justice Taney remarked, "it appears that the principal matter in dispute, is the right to the

oyster fishery in the public rivers and bays of East Jersey" – rivers and bays navigable in character. 41 U.S. at 407. In that navigability context, the *Martin* opinion stated that the people of each State "hold the absolute right to all their navigable waters and the soils under them for their own common use." *Id.*, at 410.

Thus *Martin* v. *Waddell* did not have occasion to consider whether New Jersey held any sovereign title to its non-navigable tidal streams.

18. Quoting from *Cobb* v. *Davenport*, 32 N.J.L. 369, 378 (Sup.Ct. 1867), and *Attorney General* v. *Delaware & Bound Brook R.R.Co.*, 27 N.J.Eq. 631, 639 (E. & A 1876), the *amici* brief of the thirteen original States concludes its New Jersey analysis by asserting that "there was a consistent assertion of title by the State to the shorelands subject to the ebb and flow of the tide from the earliest times." 13 Br. 16.

18. Neither of the cited cases purports to decide or discuss whether the ebb and flow test would confer on the State sovereign title to lands under non-navigable discrete streams subject to tidal influence. The cases merely affirmed that New Jersey made and had no claim to its non-tidal freshwaters.

See also *Ross* v. *Mayor of Edgewater*, 115 N.J.L. 477, 483 (Sup.Ct. 1935), holding that "While a boundary on a non-navigable stream extends *ad medium filum aquae*, in the case of bays, arms of the sea, and navigable rivers, it reaches only to the shore or ordinary high water mark." To the same effect for an

earlier period of time, see *Bell* v. *Gough*, 23 N.J.L. 624, 662 (1852).

That New Jersey may have asserted title to shorelands subject to tidal ebb and flow is quite irrelevant to the issue in the instant case, which involves not shorelands but discrete non-navigable drainage streams.

PENNSYLVANIA

19. The *amici* brief cites only *Ball* v. *Slack*, 2 Whart 508, 539 (Pa. 1837), to the effect that the State owns lands between the low and high tide marks of the ocean "and wherever the tide ebbs and flows," that being "part of the common highway . . ." 13 Br. 16-17.

19. *Ball* deals with wharfing out into the navigable waters of the Delaware River. It says nothing about title to discrete non-navigable drainage streams.

Moreover, in referring to the *Ball* statement about tidal waters being "part of the common highway," the *amici* brief omits the words immediately following "the common highway" – i.e., "the common highway, over which all citizens and aliens may sail." 2 Whart at 539. Such a reference can only be to a common highway over a navigable body of water. A non-navigable stream cannot provide such a common highway.

DELAWARE

20. The *amici* brief quotes the following from *Bickel et al. v. Polk*, 5 Del. (Harr.) 325, 326 (1851): "In all navigable waters, where the tide ebbs and flows, the people have of common right the privilege of fishing, and of navigation, between high and low water mark, though it be over private soil." 13 Br. 17.	20. It cannot be assumed that the reference in *Bickel* to "navigable waters" includes "non-navigable waters." Further, the right to fish says nothing of ownership of the underlying soil. *Bickel* stated that the right of fishing "in all public streams" where the tide ebbs and flows is also a common right. 5 Del. at 326. That language, if relevant at all, suggests that, if only public navigable streams are subject to public rights of fishing, it is unlikely that non-navigable waters would be other than privately owned.
21. "It has also been stated that the tidelands in Delaware, which are subject to the public's trust rights, is not 'limited to that appurtenant to an ocean. On the contrary, foreshore can be found along any tidal water.' *Phillips v. State, Ex Rel. Department of Natural Resources*, 449 A.2d 250, 255 (1982) . . ." 13 Br. 17.	21. The quotation from the *Phillips* case is inaccurate. The subject of the quoted matter is not "tidelands" but "foreshore," thus making the sentence read: "it cannot be said that foreshore is limited to that appurtenant to an ocean." 449 A.2d at 255. The *Phillips* statement was meant to establish that foreshore may be found along a bay, as well as an ocean. Thus it is quite irrelevant to the question in the instant case.

MARYLAND

22. "After the Revolution, the tidelands were held by the State for the benefit of the public by virtue of Article 5 of the Declaration of Rights in the Maryland Constitution. *Board of Public Works* v. *Larmar Corp.*, 262 Md. 24, 277 A.2d 427 (1927) . . . (additional citations omitted)." 13 Br. 18.

22. Neither the *Larmar* case nor any of the other cited cases concerns ownership of lands under non-navigable tidally influenced waters. Indeed, that issue has never been decided by a Maryland court. And since the discrete streams in the instant case are not true "tidelands" in the public trust sense, what claim Maryland may have made to her tidelands "after the Revolution" is beside the point.

VIRGINIA

23. "In Virginia, the law at the time of adoption of the Constitution was a codification of the English common law, the Act of May 1780 . . . This Act reserved '[A]ll unappropriated lands on the Bay of the Chesapeake, or the sea shore, or the shores of any river or creek' for use 'as a common to all of the good people' of the Commonwealth. *Garrison* v. *Hull & als.*, 75 Va. 150, 160 (1881)." 13 Br. 19.

23. In a passage omitted from the *amici* brief, the 1780 statute declared that "all unappropriated lands . . . *which have remained ungranted by the former government, and which have been used* as a common to all of the good people" are excepted from the statute's provision for the granting of land (omitted passage italicized).

The *Garrison* court understood this statute to preserve the fishing rights of the people by reserving to the public only those waters 1) not already privately owned, and 2) used by the

public. The statute did not adopt a tidal test of public ownership. It merely declared that waters already owned by the public would stay that way. Also, the statute concerned public waters alone, and not private, non-navigable waters. It did not seek to reserve for the public those streams whose use by the public was miniscule if not non-existent.

24. "A Virginia Legislature Act of 1819 extended to the low waster mark the seaward boundary of an upland owner's property, if the grant was made prior to 1780. However, even though title was in the upland owner, the shoreland remained subject to the public's right to fish, fowl and hunt. See *Bradford* v. *Nature Conservancy*, 224 Va. 181 (1982)." 13 Br. 19.

24. The 1819 statute cited in *Bradford* in no way reserved to the State any lands by virtue of the ebb and flow test. Rather, it applied very specifically to "the Atlantic Ocean, the Chesapeake bay, and the rivers and creeks thereof." 224 Va. at 196. It did not address the question of navigability or whether non-navigable creeks were to be included.

Indeed, Virginia has never applied the ebb and flow test. The State has never claimed waters or underwater lands not already in public use.

NORTH CAROLINA

25. "In the seminal case of *State* v. *Glen*, 52 N.C. (7 Jones) 321 (1859), the court reviewed its prior decisions and reaffirmed the primary classes of waters which con-

25. The "seminal case" of *State* v. *Glen* actually says quite the opposite. It states: "In England, navigable waters which are *publici juris*, and as such distinguishable from

tinue to be recognized: public trust beds and private beds. The *Glen* court recognized that public trust ownership of the bed extends both to all lands subject to the ebb and flow of the tides to the farthest influx of salt water, *Collins* v. *Benbury*, 25 N.C. (3 Ired.) 277 (1842), and to all waters navigable by "sea vessels' as defined in *Wilson* v. *Forbes*, *supra*." 13 Br. 20.

those we have been describing, are ascertained by the ebb and flow of the tide. This criterion has been held by our courts not to be applicable to the watercourses of North Carolina, and has been long since repudiated. We hold that any waters, whether sounds, bays, rivers, or creeks, which are wide enough and deep enough for the navigation of sea vessels, are navigable waters, the soil under which is . . . common to all the citizens of the State. *Wilson* v. *Forbes*, 13 N.C. 30; *Collins* v. *Benbury*, 25 N.C. 277; *Fagan* v. *Armstead*, 33 N.C. 438, and *S.* v. *Dibble*, 49 N.C. 107. In streams not navigable the bed of the river may be, under the general entry law, the subject of a grant to a private individual, and the riparian proprietor will be without an express grant of the bed of the stream, entitled to the propriety of the soil." *Id.*, 52 N.C. at 251.

Collins v. *Benbury*, *supra*, held that Albemarle Sound was a navigable water, "whether there was any tide or not in the Sound." *Id.*, at 197. The court also held that legislative references to navigable waters must refer to "the actual state of our own streams, rivers and

sounds, rather than in the sense of the common law, which would render them inapplicable to our condition." *Id.*

The North Carolina cases extend public ownership to non-tidal rivers that are navigable in fact, using the term "navigable waters" to mean actual navigability. The ebb and flow test is nowhere used as the definition of "navigable waters." Nor has the State claimed any non-navigable tidally influenced streams, which are deemed subject to private ownership.

SOUTH CAROLINA

26. "In South Carolina, in accordance with the common law, the title to land under tide waters was in the State, and a grant of land bounded by such waters passed no title below high water mark. Thus, in 1884, the South Carolina Supreme Court . . . ruled that title to several hundred acres of salt water marshland 'below the line of high water-mark, and subject to the daily ebb and flow of the tides' was held by the State. *State* v. *Pinckney*, 22 S.C.Rep. 483, 508 (1884)." 13 Br. 21.

The brief concludes that "at the time of statehood . . . South Carolina applied the com-

25. The South Carolina courts, like those of the other original States, were never called upon to consider the ownership of non-navigable discrete streams that are tidally influenced. The *Pinckney* case, like so many others, involved the rights of riparian owners to the shorelands of large navigable tidal rivers. It is futile to seek in such cases any evidence of a state claim to lands such as are at issue in the instant case.

mon law to its shorelands, that is, those lands below the line of high water-mark, and subject to the daily ebb and flow of the tides, were held by the State." *Id.*

GEORGIA

27. The *amici* brief cites *Johnson* v. *State*, 114 Ga. 790, 791, 40 S.E. 807, 808 (1901), for the following proposition (13 Br. 22):

"While the first Georgia Code adopted in 1863 expanded the concept of State-owned waters to include those freshwater rivers which are navigable-in-fact, the Georgia Supreme Court concluded that the Georgia statute which accorded to the adjacent landowner title to the bed of non-navigable streams did not apply to tidewaters. Lands subject to the ebb and flow of the tide, even if not navigable-in-fact, remained publicly-owned tidelands."

27. The *Johnson* case involved a criminal charge of taking oysters from lands between high and low water of a tidal bay. In its opinion, the Georgia court wrote: "the sole test to be applied in determining whether or not a stream is navigable is its capacity to bear upon its bosom boats loaded with freight, and that the question whether or not the tide ebbs and flows in any part of the stream should not be considered." *Id.*, 114 Ga. at 791, 40 S.E. at 808.

28. "In a dispute over oyster rights in a stream subject to the ebb and flow of the tide and not navigable-in-fact, the Supreme Court of Georgia held that the non-navigable streams and adjacent marshes were public lands subject to a public oyster lease. *Oemler* v.

28. The *Oemler* court was called upon to construe a grant from King George II. It held that "so far from conveying the marshes, the marshes are used to limit the island. They are the point beyond which the island is not to go." *Id.* The court specifically refrained

Green, 134 Ga. 198, 67 S.E. 433 (1910)." 13 Br. 22.

from reviewing its decision in *Johnson* v. *State*, *supra*. Thus the *Oemler* ruling was based not on any theory of navigable waters but on a simple construction of a royal grant.

29. "While there have been specific grants of title and other rights in lands covered by tidewaters, such private ownership remains subject to the public trust rights of navigation, transportation and public passage, regardless of navigability-in-fact of the adjacent waters. Ga. Laws, 1902, p. 108; Ga.Code Ann. sec. 44-8-8 (1982). In addition, the public has the right to fish in all waters subject to the ebb and flow of the tide, whether navigable or non-navigable. *West* v. *Baumgartner*, 124 Ga.App. 318, 184 S.E. 2d 533 (1971), reversed on other grounds, 228 Ga. 671 (1972)." 13 Br. 22-23.

29. The cited 1902 statute expressly recognized that title to the beds of all non-navigable tidelands, where the tide ebbs and flows, "shall vest in the present owner of the adjacent land for all purposes." Georgia has thus limited its title claims to navigable-in-fact tidewaters. See *West* v. *Baumgartner*, 124 Ga.App. 318, 324, 184 S.E. 2d 213, 219-220 (1971).

CONCLUSION

The brief of the thirteen original States concludes its survey with these words: "It is clear that each and every one of the thirteen original States made clear and definitive claims of ownership, or control, over the lands subject to the ebb and flow of the tide, without regard to

the navigability of the adjacent water, at the time the Constitution was adopted." 13 Br. 23.

Petitioners suggest that this survey proves quite the opposite. There appears to be no clear precedent, at the time the Constitution was adopted, indicating that any of the original thirteen States made any claim of sovereign title over discrete non-navigable drainage streams of the type involved in the instant case.

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In The

Supreme Court of the United States

October Term, 1986

PHILLIPS PETROLEUM COMPANY, and CINQUE BAMBINI PARTNERSHIP,

Petitioners,

vs.

STATE OF MISSISSIPPI and SAGA PETROLEUM U.S., INC.,

Respondents.

BRIEF AMICUS CURIAE OF THE CITY OF ELIZABETH, NEW JERSEY, A MUNICIPAL CORPORATION and NEW JERSEY LAND TITLE ASSOCIATION, A NEW JERSEY CORPORATION

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MOTION TO FILE BRIEF AMICI CURIAE OUT OF TIME

1. As soon as *amici curiae* became aware of the Petition for a Writ of Certiorari to the Supreme Court of Mississippi in this matter, they moved promptly at meetings of their respective governing bodies to authorize the filing of a brief *amici curiae* on their behalf and in support of the petition. The City Council of Elizabeth was the last to act, authorizing on February 10, 1987 the filing of this brief.

2. The *amici curiae* previously sought a final adjudication

of the nature and scope of the sovereign ownership rights of their state in *City of Newark v. Natural Resource Council*, 82 N.J. 530, 414 A. 2d 1304 (1980), *cert. denied*, 449 U.S. 983 (1980).

3. The brief *amici curiae* stresses the national importance of the issue presented as it defines the sovereign ownership rights of the 13 original states and the states thereafter admitted to the Union under the Equal Footing Doctrine.

4. Allowing the filing of the brief *amici curiae* out of time, will not delay the consideration of the Petition for a Writ of Certiorari and will not prejudice any party.

Wherefore, the City of Elizabeth, New Jersey and the New Jersey Land Title Association pray for an order allowing the filing of an *amici curiae* brief in their behalf out of time in the above-captioned case.

Respectfully submitted,

JOHN R. WEIGEL
Attorney for Amici Curiae

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INTEREST OF THE AMICI CURIAE

The petition for certiorari of the petitioners in this action presents an issue of importance to the 50 states and their political subdivisions and citizens concerning the ownership rights a state possesses as an incident of its domestic sovereignty.

The *amicus curiae* City of Elizabeth is a municipal corporation, situated in Union County, New Jersey, and a political subdivision of the State of New Jersey. It owns of record certain lands in Elizabeth which are non-navigable but claimed to be owned in fee simple absolute by New Jersey on the basis of the tideland doctrine, a substantive real property law doctrine of the state which holds that lands now or formerly flowed, naturally, by the mean high tide are state-owned, without regard to whether or not they were ever navigable.

The *amicus curiae* New Jersey Land Title Association is a New Jersey corporation and the trade association of the title insurance underwriters which write substantially all of the title insurance written in New Jersey. Title insurance indemnifies owners and mortgagees for losses, including losses arising from defects of title. Up until the late 1950's New Jersey applied a dual test of navigability and tidal ebb and flow as the basis for its sovereign ownership rights. Thereafter, New Jersey eliminated the navigability element of the test of sovereign ownership and expanded its ownership claims into vast areas of interior, tide-flowed meadowlands and wetlands which are not, and never have been, navigable. The member companies of the New Jersey Land Title Association have insured the private record ownership of numerous titles which are today claimed to be owned by New Jersey as a result of its expansion of its sovereign ownership claims into vast areas of interior, tide-flowed meadowlands and wetlands which are not, and never have been, navigable.

BRIEF SUBMITTED PURSUANT TO RULE 36.4

This brief *amicus curiae* is submitted pursuant to Rule 36.4, the City of Elizabeth being a political subdivision of the State of New Jersey.

SUMMARY OF ARGUMENT

The sovereign ownership rights of the 50 states are dependent upon federal constitutional principles which define the nature and scope of their domestic sovereignty, and those sovereign ownership rights are not dependent, in the first instance, upon the substantive real property law of each of the 50 states. As of the date of its entry into the Union, federal constitutional principles relating to the state's domestic sovereignty limit its sovereign ownership rights to the navigable waterways within its boundaries. Thereafter, the substantive real property law of the state determines dispositions and the title consequences of any subsequent shifts or changes in the beds of the said navigable waterways. Likewise, a state thereafter may resign certain of its sovereign ownership rights, as New Jersey has done with respect to fresh water navigable waterways, but it may not retroactively expand its sovereign ownership rights into vast areas of interior, tide-flowed meadowlands and wetlands which are not, and never have been, navigable.

ARGUMENT

THE SOVEREIGN OWNERSHIP RIGHTS OF THE 50 STATES ARE LIMITED BY FEDERAL CONSTITUTIONAL PRINCIPLES TO THE NAVIGABLE WATERWAYS WITHIN THEIR BOUNDARIES.

At the time of the American Revolution, the people of each of the 13 original states became themselves sovereign and, in that capacity, hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the United States Constitution to the general government.[1] *Martin v. The Lessee of Waddell,* 41 U.S. 367, 410 (1842). Under the Equal Footing Doctrine new states, upon their admission to the Union, acquired title to the lands underlying navigable waters within their boundaries. *Pollard's Lessee v. Hagan,* 3 Howard 212 (1845); *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company,* 429 U.S. 363, 370 (1977).

The nature and scope of the domestic sovereignty of the 50 states is dependent upon federal constitutional principles and not upon the substantive real property law of each of the 50 states. *Id.,* 429 U.S. at 374 and 381. The parity between the 50 states as respects political standing and sovereignty is a federal constitutional requirement. *United States v. Texas,* 339 U.S. 707, 719-720 (1949). The ownership of navigable waters and the soils under them within state boundaries is "an inseparable attribute of the political sovereignty guaranteed equally to all States . . ." *United States v. Louisiana,* 363 U.S. 1, 77 (1960). *See United*

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1. Article 1, Sec. 8 of the United States Constitution created a navigational servitude in favor of the federal government under which navigable waters are within the control of the United States for the purpose of regulating and improving navigation. *Gibson v. United States,* 166 U.S. 269, 271-271 (1897).

States v. Texas, supra at 716.

A state's sovereign ownership rights are initially fixed at the time of its entry into the Union to the beds of the navigable waterways within its boundaries. Thereafter, the substantive real property law of the state determines dispositions and the title consequences of any subsequent shifts or changes in the beds of the said navigable waterways. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, supra* at 370-371 and 377-378. In general, the states are at liberty to resign or convey their title to riparian proprietors, subject only to the paramount right of navigation over the waters. The Court observed in *Barney v. Keokuk*, 94 U.S. 324, 339 (1876):

> If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.

The purpose underlying sovereign ownership of waterways is the protection of public rights of navigation and commerce from private interruption and encroachment. *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387, 436 (1892). The definition of "navigability" which was formulated by the Court and has been followed generally in this country is found in *The Daniel Ball*, 77 U.S. 557, 563 (1870):

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the

customary modes of trade and travel on waters.'"[2]

CONCLUSION

The expansion by the State of Mississippi of its sovereign ownership claims into tidal wetlands which are not, and never have been, navigable violates federal constitutional principles which limit its ownership rights to the navigable waterways within its boundaries.

The issue here involved implicates all 50 states, and the Supreme Court of the United States should now clarify that, at the time of their entry into the Union, the sovereign ownership rights of all of the states were limited by federal constitutional principles to the navigable waterways within their boundaries. For the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Mississippi.

Respectfully submitted,

JOHN R. WEIGEL
Attorney for Amici Curiae

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2. An erroneous declaration of Chancellor Kent in an early decision, which he later carried into his *Commentaries*, resulted in the admiralty jurisdiction of the United States being limited to tidal waters until 1851 when the Court decided *The Propeller Genesee Chief v. Fitzhugh*, 12 Howard 441. The differences in geography between England and the United States contributed to this erroneous view of the common law rule on navigable waters. In England, no waters are navigable in fact, at least to any great extent, which are not subject to the tide. Accordingly, "navigability" and "tidal ebb and flow" are synonymous terms, and "tidal ebb and flow" became the familiar mode of describing a public river.

No. 86-870

Supreme Court, U.S.
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In The

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October Term, 1986

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vs.

STATE OF MISSISSIPPI and SAGA PETROLEUM U.S., INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

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MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE

1. On February 23, 1987 this Court granted the motion of the City of Elizabeth, New Jersey, a municipal corporation, and the New Jersey Land Title Association, a New Jersey corporation, to file a brief *amici curiae* out of time in this matter and in support of the petition for a writ of certiorari to the Supreme Court of Mississippi. On the same date the Court granted the petition for a writ of certiorari.

2. The *amici curiae* previously sought a final adjudication of the nature and scope of the sovereign ownership rights of their state in *City of Newark v. Natural Resource Council*, 82 N.J. 530, 414 A. 2d 1304 (1980), *cert. denied*, 449 U.S. 983 (1980).

3. This case concerns the nature and scope of the ownership rights the State of Mississippi possesses as an incident of its municipal sovereignty. Because the United States Constitution requires parity between the 50 states as respects political standing and sovereignty, a decision by the Court on the merits of this case necessarily will implicate the sovereign ownership rights of all of the states.

4. The brief *amici curiae* attached to this motion stresses the national importance of the issue presented as it defines the sovereign ownership rights of the 13 original states and the states thereafter admitted into the Union under the Equal Footing Doctrine. The briefs of the various parties to the appeal may not emphasize the national importance of this issue nor the historical development of these sovereign ownership rights in England and in the 13 original states. Importantly, the briefs of the parties may not describe the chaotic conditions that have existed in New Jersey in the last two decades as the State of New Jersey has sought to retroactively expand its sovereign ownership claims into vast areas of interior, tide-flowed meadowlands and wetlands which are not, and never have been, navigable.

5. This motion and the attached brief *amici curiae* are being submitted to the Court prior to May 9, 1987, the deadline for the filing of the first brief on the merits by a party. Allowing the filing of the brief *amici curiae* will not prejudice any party.

Wherefore, the City of Elizabeth, New Jersey and the New Jersey Land Title Association pray for an order allowing the filing of the attached brief *amici curiae* on their behalf in the above-

captioned case and in support of petitioners on the merits.

Respectfully submitted,

JOHN R. WEIGEL
Attorney for Amici Curiae

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INTEREST OF THE AMICI CURIAE

This case presents an issue of importance to the 50 states and their political subdivisions and citizens concerning the

ownership rights a state possesses as an incident of its municipal sovereignty.

The *amicus curiae* City of Elizabeth is a municipal corporation, situated in Union County, New Jersey, and a political subdivision of the State of New Jersey. It owns of record certain lands in Elizabeth which are non-navigable but claimed to be owned in fee simple absolute by the State of New Jersey on the basis of the tideland doctrine, a substantive real property law doctrine of the state which holds that lands now or formerly flowed, naturally, by the mean high tide are state-owned, without regard to whether or not they were ever navigable. Additionally, a significant portion of the tax base of the City of Elizabeth is today in jeopardy as a result of the State of New Jersey's application of the tideland doctrine. Millions of dollars of real property, much of which was purchased for then full value and improved decades ago by its private record owners, is today claimed by the State of New Jersey under the tideland doctrine, notwithstanding the fact it has been assessed and taxed for years by the City of Elizabeth to its private record owners to help pay the costs of government.

The *amicus curiae* New Jersey Land Title Association is a New Jersey corporation and the trade association of the title insurance underwriters which write substantially all of the title insurance written in New Jersey. Title insurance indemnifies owners and mortgagees for losses, including losses arising from defects and failures of title. Until the late 1950's the State of New Jersey routinely applied a dual test of navigability and tidal ebb and flow as the basis for its sovereign ownership rights. Thereafter, as the economic value of tide-flowed meadowlands and wetlands held in private record ownership increased significantly, the State of New Jersey simply eliminated the element of navigability from its test of sovereign ownership and retroactively expanded its ownership claims into vast areas of interior, tide-flowed

meadowlands and wetlands which are not, and never have been, navigable. For nearly 300 years, until the abrupt change in the late 1950's, sovereign ownership rights in New Jersey were limited to lands which, in their natural condition, were both flowed by the mean high tide and navigable. The member companies of the New Jersey Land Title Association have insured the private record ownership of countless thousands of titles which are today claimed to be owned by the State of New Jersey as a result of its retroactive expansion of its sovereign ownership claims into vast areas of interior, tide-flowed meadowlands and wetlands which are not, and never have been, navigable.

BRIEF SUBMITTED PURSUANT TO RULE 36.4

This brief *amici curiaè* is submitted pursuant to Rule 36.4, the City of Elizabeth being a political subdivision of the State of New Jersey.

SUMMARY OF ARGUMENT

The sovereign ownership rights of the 50 states are dependent upon federal constitutional principles which define the nature and scope of their municipal sovereignty, and those sovereign ownership rights are not dependent, in the first instance, upon the substantive real property law of each of the 50 states. As of the date of its entry into the Union, federal constitutional principles relating to the state's municipal sovereignty limit its sovereign ownership rights to the navigable waterways within its boundaries. Thereafter, the substantive real property law of the state takes over and determines dispositions and the title consequences of any subsequent shifts or changes in the beds of the said navigable waterways. Likewise, a state thereafter may resign certain of its sovereign ownership rights, as New Jersey has done with respect to fresh-water navigable waterways and as other states have done with respect to the band of land between the mean high water

line and the mean low water line, but it may not retroactively expand its sovereign ownership rights into vast areas of interior, tide-flowed meadowlands and wetlands which are not, and never have been, navigable.

The purpose underlying sovereign ownership of waterways is the protection of public rights of navigation and commerce from private interruption and encroachment. By definition, non-navigable areas are not amenable to public rights of navigation and commerce, and, therefore, sovereign ownership of such non-navigable areas is not necessary for the protection of those public rights since they simply do not adhere there. Nor is sovereign ownership of these non-navigable areas mandated by any environmental concern; environmental protection of ecologically sensitive, non-navigable areas can be secured by a system of land use regulations which control the impact of private land use decisions and prevent them from causing public harm.

Consistent with this purpose of protecting public rights of navigation and commerce, sovereign ownership rights are limited to waterways which are navigable in fact. The rights of the public are entirely dependent on the capacity of the waterway for navigation and on its functional utility as a public artery for transportation and commerce. This is the rule of the English common law as well as the rule adopted and applied in this country. Under the English common law "tidal ebb and flow" is a term of limitation of sovereign ownership rights within navigable waterways, and it is not a term of expansion of sovereign ownership rights into non-navigable areas. Both under the English common law and American law the functional utility of the waterway for public transportation and commerce, and not tidal ebb and flow, determines its public character and the dominion and ownership of the sovereign.

Retroactive expansion of sovereign ownership claims into vast

areas of interior, tide-flowed meadowlands and wetlands which are not, and never have been, navigable will create chaos and economic blight in the coastal margin of this country and wherever there are fresh-water wetlands. Dubious and costly mapping of state ownership claims will take years to complete. Ultimately, most asserted sovereign ownership claims will be disputed and contested on legal and equitable grounds by record property owners, thereby taxing administrative and judicial systems. Constantly changing tidal datums will add even more uncertainty to the title boundary between public and private land. An orderly system of land conveyancing requires that the boundary between public and private land remains as constant over time as it can, given the natural changes which occur along any waterway. The maximum certainty and continuity over time are achieved by containing sovereign ownership rights to the well-defined beds of navigable waterways rather than expanding those ownership rights into vast areas of interior, tide-flowed meadowlands and wetlands which are not, and never have been, navigable.

ARGUMENT

THE SOVEREIGN OWNERSHIP RIGHTS OF THE 50 STATES ARE LIMITED BY FEDERAL CONSTITUTIONAL PRINCIPLES TO THE NAVIGABLE WATERWAYS WITHIN THEIR BOUNDARIES, AND THOSE SOVEREIGN OWNERSHIP RIGHTS DO NOT EXTEND INTO INTERIOR, TIDE-FLOWED MEADOWLANDS AND WETLANDS WHICH ARE NOT, AND NEVER HAVE BEEN, NAVIGABLE.

At the time of the American Revolution the people of each of the 13 original states became themselves sovereign and, in that capacity, hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the United States Constitution to

the general government. *Martin v. The Lessee of Waddell*, 16 Peters 367, 410 (1842).[1] *See* United States Constitution, Article

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1. This was an action in ejectment involving 100 acres of oyster bed in Raritan Bay in Perth Amboy, New Jersey at a place where the Bay was both navigable and tidal. This Court was called upon to construe charters made by King Charles II of England to his brother James, Duke of York in 1664 and 1674 and subsequent conveyances under which the territory in the grant became vested in the Board of Proprietors of the Eastern Division of New Jersey. Afterwards in 1702, the Board of Proprietors surrendered all of the powers of government to Queen Anne of England, retaining the Board's rights of private property. Mr. Chief Justice Taney stated: (1) The right of the king to make the grant, with all of its prerogatives and powers of government, cannot at this day be questioned. *Id.*, 408; (2) The English possessions in America were not claimed by right of conquest but by right of discovery, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered. *Id.*, 409; (3) The land described in the charters was held by the king in his public and regal character as the representative of the nation and in trust for them, and the crown, according to the principles of the British Constitution, was the proper organ to dispose of the public domains. *Id.*, 409; (4) A true construction of the charters reveals that their object was to enable the Duke of York to establish a colony upon the newly discovered continent, to be governed, as nearly as circumstances would permit, according to the laws and usages of England. *Id.*, 412; (5) "And in the judgment of the court, the land under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; and were to be held by him in the same manner, and for the same purposes that the navigable waters of England, and the soils under them, are held by the crown." *Id.*, 413-414; (6) This opinion is confirmed by referring to similar and contemporaneous grants by different monarchs of the Stuart dynasty for the purposes of settlement and colonization of other large territories upon this continent. "In all of them, from the time of the settlement to the present day, the previous habits and usages of the colonists have been respected, and they have been accustomed to enjoy, in common, the benefits and advantages of the navigable waters for the same purposes and to the same extent that they have been used and enjoyed for centuries in England." *Id.*, 414, and (7) The same principles of construction applied by the Court to the charters apply with equal force to the surrender of the powers of government in 1702. *Id.*, 414-415. *See Den v. Jersey City*, 15 Howard 426 (1853); *Hoboken v. Pennsylvania Railroad Company*, 124 U.S. 656 (1888).

1, Section 8, paragraph 3. Under the Equal Footing Doctrine new states, upon their admission into the Union, acquired title to the lands underlying navigable waters within their boundaries. *Pollard's Lessee v. Hagan*, 3 Howard 212 (1845)[2]; *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company*, 429 U.S. 363, 370 (1977). Lands under navigable waters were not

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2. This was an action in ejectment involving certain tidelands along the Mobile River in Mobile, Alabama. The Act of Congress of March 2, 1819 admitting the State of Alabama into the Union provides in section 6 "that all navigable waters within the said State shall forever remain public highways, free to the citizens of said State, and of the United States, without any tax, duty, impost, or toll therefor, imposed by the said State." *Id.*, 229. Similar provisions are contained in most of the Acts of Congress admitting new states into the Union. 1 *Waters and Water Rights* 48, Farnham, The Lawyers' Co-operative Publishing Company (1904). Prior to the formation of the federal government in 1789, the old Congress adopted a resolution on September 6, 1780 recommending that the old states voluntarily surrender their "waste and unappropriated lands" to the United States to aid in paying the public debt incurred during the American Revolution. Many of the old states did make such surrender and cession. This Court held in *Pollard's Lessee v. Hagan, supra* at 224:

> The object of all of the parties to these contracts of cession was to convert the land into money for the payment of the debt, and to erect new States over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease.
>
> Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new States will be complete, throughout their respective borders, and they, and the original States, will be upon an equal footing, in all respects whatever. We, therefore, think the United States hold the public lands within the new States by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new States, for that particular purpose.

granted by the United States Constitution to the federal government but were reserved to the states. *Pollard's Lessee v. Hagan, supra* at 230.

As then Mr. Justice Rehnquist observed in *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979), any reliance on judicial precedent must be predicated upon a careful appraisal of the purpose for which the concept of "navigability" was invoked in a particular case. The purpose underlying sovereign ownership of waterways is the protection of public rights of navigation and commerce from private interruption and encroachment. *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387, 436 (1892). Mr. Justice Field stated:

> So also, by the common law, the doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable

> waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.

Id., 436-437. This Court held that the State of Illinois' title to lands under navigable waters is "different in character" from that which the state holds in lands intended for sale:

> It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.[3]

Id., 452. Placing ownership of navigable waters and the soils under them in the sovereign assures protection of public rights of commerce, navigation and fishing. As was stated in *Barney v. Keokuk*, 94 U.S. 324, 338 (1876):

> [T]he public authority ought to have entire control of the great passage ways of commerce and navigation, to be exercised for the public advantage and convenience.

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3. This Court held that the Act of the Illinois Legislature of April 16, 1869 in conveying to the Illinois Central Railroad Company one mile of the bed of Lake Michigan in front of the City of Chicago amounted to an abdication of sovereignty "over lands under the navigable waters of an entire harbor," and "[s]uch abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public." *Id.*, 452-453.

The right of each state in the Union to all of its navigable waters and the soils under them was not altered by The Submerged Lands Act, 43 U.S.C.A. 1301, *et seq.*, which was enacted on May 22, 1953. The Act merely confirmed the states' pre-existing rights in the beds of the navigable waterways within their boundaries by, in effect, quitclaiming all federal title thereto. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, supra* 372, footnote 4. In explaining the purpose of the Act, it is said in 1 *Shore and Sea Boundaries* 118, Shalowitz, U.S. Department of Commerce, Coast and Geodetic Survey, Publication 10-1 (December 1978 reprint):

> [I]t should be remembered that the basic consideration of the act is that the submerged lands must be under the *navigable* waters within its state boundaries.

Federal Constitutional Principles Define State Sovereign Ownership Rights.

The nature and scope of the municipal sovereignty of the 50 states is dependent upon federal constitutional principles, and those sovereign ownership rights are not dependent, in the first instance, upon the substantive real property law of each of the 50 states. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, supra* at 374 and 381. The parity between the states as respects political standing and sovereignty is a federal constitutional requirement. *United States v. Texas*, 339 U.S. 707, 719-720 (1949). The ownership of navigable waters and the soils under them within state boundaries is "an inseparable attribute of the political sovereignty guaranteed equally to all States . . ." *United States v. Louisiana*, 363 U.S. 1, 77 (1960). *See Pollard's Lessee v. Hagan, supra* at 230 [the new states have the "same rights, sovereignty, and jurisdiction" over their navigable waters and the soils under them as the 13 original states]; *United States*

v. Texas, supra at 716. The ownership rights involved arise as an incident of the state's municipal sovereignty. We are not dealing here with substantive real property law as such, but rather with an issue substantially related to the constitutional sovereignty of the states. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, supra* at 374 and 381.

A state's sovereign ownership rights are initially fixed by federal constitutional principles at the time of its entry into the Union to the beds of the navigable waterways within its boundaries. *Martin v. The Lessee of Waddell, supra; Pollard's Lessee v. Hagan, supra. See Shively v. Bowlby*, 152 U.S. 1 (1894) for a review of decisions of this Court "upon the subject of public and private rights in lands below high water mark of navigable waters." *Id.*, 11. Thereafter, the substantive real property law of the state takes over and determines dispositions and the title consequences of any subsequent shifts or changes in the beds of the said navigable waterways. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, supra* at 370-371 and 377-378. In general, the states are at liberty to resign or convey their title[4] to riparian proprietors, subject only to the paramount right of navigation over the waters. The State of New Jersey has resigned its ownership rights to the lands under fresh-water navigable waterways; it has never asserted such rights and has accepted that such lands are subject to private ownership. Likewise, various of the states have accepted that the band of land between the mean high water line and the mean low water line is subject to private ownership.[5] This Court stated in *Barney v. Keokuk, supra* at 339:

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4. *Illinois Central Railroad Company v. Illinois, supra* 452-453, provides one limitation on the conveyance by a state of public trust lands.

5. The diversity of the substantive real property law of the various states relating to the ownership of shore land is set forth in a 1960 report for the (Cont'd)

> If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.

Misinterpretation of *The Royal Fishery of the Banne* Case.

Chancellor Kent of the New York Supreme Court originated the erroneous doctrine that at common law only tidal waterways were navigable. In *Palmer v. Mulligan*, 3 Caines 307 (1805), 2 Am. Dec. 270, which was an action for building upon the bed of the Hudson River in such a way as to interrupt the rafting of timbers into plaintiff's dam, and to change the course of the water, Chancellor Kent said that "the Hudson at Stillwater is a fresh water river, not navigable in the common-law sense of the term, because the tide does not ebb and flow at that place. In the *Royal Fishery of the Banne*, it was resolved that by the rules and authorities of the common law every river where the sea does not ebb and flow was an inland river, not navigable, and belonged to the owners of the adjoining soil." This erroneous doctrine was carried by Chancellor Kent into his *Commentaries* and was soon afterwards adopted by Joseph K. Angell in his *Treatise on the Right of Property in Tide Waters and in the Soils and Shores Thereof*, published by Harrison Gray, Boston (1826).

(Cont'd)
American Society of Civil Engineers entitled "State Regulation of Coastal Structures." *See* 2 *Shore and Sea Boundaries, supra* at 533, footnote 104. This report on the boundary between public and private lands notes that of the seven Great Lakes states, four use the water's edge, one the low-water mark, one the high-water mark, and one ordinary high water; of the five Pacific Ocean states, four use mean high water and one, Alaska, uses mean low water; of the five Gulf states, two use mean high water, one uses lower high water, one highest water during winter, and one mean higher high water; and of the 15 Atlantic states, eight use mean high water and seven use mean low water, with one of the latter group, Maryland, using mean high water for Chesapeake Bay.

These two text books were so universally used in this country during its early history that the doctrine was widely circulated and commonly accepted. 1 *Waters and Water Rights, supra* at 104. Professor Henry Phillip Farnham of Yale dismissed Chancellor Kent's doctrine in these words:

> Since Chancellor Kent's doctrine was based entirely on the *Banne Case* it is very evident that it is not supported by the authorities cited, and since the doctrine is not that of the common law the theory must be regarded as unsound.

Id., 109.

In *The Royal Fishery of the Banne,* Davies Rep. 149 (circa 1604)[6] the court classified rivers as of two kinds—navigable and not navigable—and said:

> Every navigable river, so high as the sea flows and ebbs in it, is a royal river, and the fishery of it is a royal fishery, and belongs to the King by his prerogatives; but in every other river not navigable, and in the fishery of such river the terre tenants on each side have an interest of common right.

The court did not define a "navigable river" but merely said that in navigable rivers subject to the ebb and flow of the tide the title to the soil was in the sovereign, while in non-navigable rivers the title was in the adjoining land owners. As noted in 2 *Shore and Sea Boundaries, supra* at 519:

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6. This case involved the ownership of part of a fishery in the Banne River, about two leagues from the sea where the stream was tidal, under a grant of land from the crown adjoining the fishery together with the fisheries within the land, but excepting three parts of the fishery. The question raised was whether the grant carried with it ownership of the fourth part. The court answered this question in the negative.

> This left a strip of navigable water—the point where the tide ceased to the point where the navigable character of the river ceased—upon which the court made no ruling as to the ownership of the soil. Yet the inference has been drawn, erroneously, that in England the only rivers that are navigable are those in which the tide ebbs and flows.

The true English doctrine is that navigable water is not synonymous with or limited to tide water but comprehends all waters that are used for public transportation and commerce. Lord Chief Justice Matthew Hale, in his treatise *De Jure Maris*, chapters 1 and 2 (*Hargrave's Law Tracts;* Hall, *Seashore*, Appx.), which was written soon after the decision in *The Royal Fishery of the Banne, supra,* makes no distinction between fresh and salt rivers in point of navigability, for he says "there be other rivers, as well fresh as salt, that are of common or public use for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are prima facie *publici juris* common highways for man or goods." 1 *Waters and Water Rights, supra* at 113; 2 *Shore and Sea Boundaries, supra* at 519.

Professor Farnham states that the "rule that navigable water is not synonymous with or limited to tide water dates back in England to the very earliest reports on record." 1 *Waters and Water Rights, supra* at 112. He traces the development of the English doctrine of navigability (*id.*, 112-116) and concludes:

> That navigability does not depend on the tide is conclusively shown by the fact that tidal water is regarded as navigable only as it is so in fact.' In

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7. One of the cases cited by Professor Farnham for this proposition is *Glover v. Powell*, 10 N.J. Eq. 211 (Chan. 1854). This case involved Little Timber

(Cont'd)

> such waters, even navigability will depend on capability of being used for useful purposes of navigation, of trade and travel in the usual and ordinary modes, and not the extent and manner of the use; a stream is navigable in fact and in law when it is capable in its natural and ordinary volume of water of transporting in a marketable condition the products of the contiguous country.

Id., 116-117. "Tidal ebb and flow" is a term of limitation of sovereign ownership rights within navigable waterways, and it is not a term of expansion of sovereign ownership rights into non-navigable areas.

(Cont'd)
Creek, a small creek, emptying into the Delaware River about five miles below the City of Camden, New Jersey. The tide, when not obstructed, ebbs and flows about two miles up the creek. The Chancellor stated:

> It appears, from the pleadings, that at certain states of the tide, this creek, if unobstructed, is navigable by small flat bottomed boats for at least two miles from its mouth. It does not appear that it ever has been used for the purposes of navigation. It has not been navigated since the year 1760. There is no allegation, on the part of the defendants, and nothing in the case to show that its navigation *now* is demanded by the public interest, or that, as a navigable stream, it would be any way beneficial to the public for the purposes of trade or agriculture. Admit, for the sake of argument, that the state legislature has not the power permanently to obstruct or to destroy any navigable river within its territorial jurisdiction, it does not follow that any creek or rivulet, in which the tide ebbs and flows, and which may be used at certain tides by small boats for individual convenience, is to be dignified with the appellation of an arm of the sea or navigable river . . .

Id., 222-223.

The misinterpretation of *The Royal Fishery of the Banne, supra,* resulted in the admiralty jurisdiction of the United States being limited to tide waters until 1851 when this Court decided *The Propeller Genesee Chief v. Fitzhugh*, 12 Howard 441. This Court held that there must be "a perfect equality in the rights and privileges of the citizens of the different states," and this parity must exist "not only in the laws of the general government, but in the mode of administering them." *Id.*, 454. Mr. Chief Justice Taney stated that "equality does not exist" if the commerce on the lakes and the navigable waters of the West is not protected in the same way that the United States Constitution protects "the States bordering on the Atlantic." *Id.*, 454. He reasoned that limiting the admiralty jurisdiction to tide waters made sense in England and in the 13 original states because there the far greater part of the navigable waters are tide waters. *Id.*, 454-455. He pointed out, however, the arbitrariness of such a rule if used as one of general application throughout this country:

> Now, there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jursidiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it.

Id., 454.

As detailed above in this Argument, sovereign ownership rights are based on a waterway being "navigable in fact." This Court formulated the definition of that term in *The Daniel Ball*, 77 U.S. 557, 563 (1870):

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on waters.

If the waterway is navigable in fact, the sovereign ownership rights extend from bank to bank. Those sovereign ownership rights, however, do not extend interior of the banks of the waterway and include tide-flowed meadowlands and wetlands which are not, and never have been, navigable.

Chaotic Conditions from Application of Tidal Ebb and Flow Test into Non-Navigable Areas.

If the retroactive expansion by the State of Mississippi of its sovereign ownership claims into tide-flowed wetlands which are not, and never have been, navigable is permitted to stand, other states will be encouraged to follow suit. Chaos and economic blight will be the sure and certain result not only in the coastal margin but also anywhere there are interior, fresh-water wetlands. New Jersey's sad experience with tideland delineation during the last two decades is what awaits the rest of this country if the judgment of the Supreme Court of Mississippi is not reversed.

In the late 1950's, after nearly 300 years in which New Jersey's interior meadowlands had been universally considered to be subject to private ownership, the State of New Jersey, for the first time, asserted a sovereign ownership claim to them. *Final Report of the New Jersey Commission to Study Meadowland Development*, page 3, (Meyner Commission) (June 1965). New Jersey's highest court upheld these sovereign ownership claims in *O'Neill v. State Highway Department*, 50 N.J. 307 (1967), 235 A. 2d 1, and wrote

out of New Jersey's substantive real property law the element of navigability from the dual test of navigability and tidal ebb and flow that had been applied consistently until that time. *Arnold v. Mundy*, 6 N.J.L. 1 (Sup. Ct. 1821), 10 Am. Dec. 356; *Bell v. Gough*, 23 N.J.L. 624 (E. & A. 1852); *Stevens v. Paterson and Newark Railroad Company*, 34 N.J.L. 532 (E. & A. 1870), 3 Am. Rep. 269; *Ross v. Mayor and Council of Edgewater*, 115 N.J.L. 477 (Sup. Ct. 1935), 180 At. 866, *affirmed*, 116 N.J.L. 447 (E. & A. 1936), 184 At. 810. Since no inventory of sovereign-owned lands existed, it was suggested in *O'Neill v. State Highway Department, supra* at 320 that one be prepared. The New Jersey Legislature responded by enacting a Meadowlands Mapping Act, New Jersey Statutes 13:1B-13.1 *et seq*. On January 14, 1970 the State of New Jersey published its claims maps in the Hackensack Meadowlands (Bergen and Hudson Counties).[8] These claims maps were suppressed for evidentiary purposes on September 8, 1971 in *State of New Jersey by the Commissioner of Transportation v. The Council in the Division of Resource Development of the State of New Jersey*, Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-12561-68 (not officially reported).

The State of New Jersey's multimillion-dollar second attempt at tideland delineation will produce a series of 1,623 maps; the first map in the series was published on June 13, 1973 and the last is expected to be published by December 31, 1987. According to the February 11, 1987 report of the agency making the maps (Office of Environmental Analysis, New Jersey State Department of Environmental Protection), 61.8% of the 1,568 maps prepared by that date depict "formerly flowed" tidelands. Countless thousands of parcels of real estate in 17 of New Jersey's 21 counties are claimed by the state as "formerly flowed" tidelands. Many

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8. Among the claims on these maps was a State of New Jersey claim of sovereign ownership to virtually the entire Town of Kearny in Hudson County. In the 1970 federal decennial census Kearny had a population of 37,262.

of these properties have been free of any tide flow for generations. They were purchased years ago in good faith and for then fair market value by their record owners. Most have been assessed and taxed for years to support government. These properties are located not only near existing waterways but also in low-lying areas far removed from any navigable watercourses. With the improvements made by their then record owners long ago, most of the "formerly flowed" tidelands are today indistinguishable from other fastland.

Although the Governor of New Jersey has tried to defuse an explosive situation by publicly promising that the state will not move to dispossess any homeowners, the tideland claims maps remain on file in the land records, and the claims impair any sale or mortgaging of these properties. No judicial or administrative mechanism exists which provides a quick and inexpensive resolution of these tideland claims. The State of New Jersey has not yet recognized the overwhelming equities on the side of the record property owners, arising from the fact the state sat back for years and did nothing to assert its tideland claims, while its citizens were purchasing these properties for then fair market value, improving them, and paying taxes on them.

When a record property owner seeks to clear the disputed title, the state vigorously pursues the ownership claims depicted on its published tideland maps and invariably uses *current* fair market value as the appropriate measure of the consideration due the state, thereby putting those record property owners in the position of buying the same property twice. The state is little concerned, if at all, that the source data for its "formerly flowed" tideland claims are often 75 or 100 or more years old; the state aggressively asserts its ownership, notwithstanding the admonition in *O'Neill v. State Highway Department, supra* at 326 that such data were not prepared with a tideland title controversy in mind, and, accordingly, there is room to question the reliability of such

data for resolving that controversy.

The choice that faces many record property owners is patently unfair. Why should they yield up to the state property which they have purchased in good faith and for full value? Yet, almost all private property owners find it prohibitively expensive to litigate with the state over its tideland claims. At trial, experts are usually required from a number of disciplines—these disciplines can include engineering, surveying, cartography, botany, geology, hydrology, real estate appraisal, law, etc. The gross injustice that this sort of case-by-case handling works is that many citizens will lose their land not because their state really has a superior title but because their private purse is no match for the state treasury.

CONCLUSION

The judgment and opinion of the Supreme Court of Mississippi in this case should be reversed because federal constitutional principles limit its sovereign ownership rights to the navigable waterways within its boundaries and do not permit retroactive expansion of those sovereign ownership rights into interior, tide-flowed wetlands which are not, and never have been, navigable. All 50 states possess the same ownership rights as an incident of their municipal sovereignty. For purposes of sovereign ownership rights, a waterway is "navigable" when it is navigable in fact. If the waterway is navigable in fact, the sovereign ownership rights extend from bank to bank but those sovereign ownership rights do not extend interior of those banks and include tide-flowed meadowlands and wetlands which are not, and never have been, navigable.

Respectfully submitted,

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April 23, 1987

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NO. 86-870

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY, and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

V.

STATE OF MISSISSIPPI and
SAGA PETROLEUM U.S., INC.,
Respondents.

On Writ of Certiorari
to the Mississippi Supreme Court

MOTION FOR LEAVE TO FILE BRIEF
AND
BRIEF OF AMICUS CURIAE,
ROBERT E. LONGINO, JR.

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Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Robert Longino respectfully states to the Court and moves the Court as follows:

1. Interest of Amicus Curiae. Robert Longino is the owner of tidally affected land on the Mississippi coast. His interest in the land is described in greater detail in the attached brief, particularly in the section stating the interest of the amicus, which is incorporated here for all purposes. In most respects, he is in the same position as the landowners who are parties in this case, except that his land is a much smaller, residential plot.

2. Appearance as Amicus in Both the Trial Court and the State Supreme Court. Robert Longino learned of the trial of this case from newspaper reports. Recognizing the significance of the issues for his own residential land, he appeared in the trial court as amicus curiae. He also appeared in the Mississippi Supreme Court as amicus curiae.

3. Desirability of an Amicus Curiae Brief; Reasons for Believing that Existing Parties May Not Address All Issues. The

decision below would create chaos for coastal land titles. Robert Longino provides the perspective of a small landowner similar to people throughout the coastal area who will need to defend their homes. This perspective is not provided by the parties. For example, on information and belief, the parties in this case spent many hundreds of thousands of dollars merely surveying a short section of coastline, but Robert Longino simply could not afford such a survey.

4. *Avoidance of Unnecessary Duplication.* This brief has been written with an awareness of the content of the Petitioner's Brief, in an effort to avoid unnecessary duplication.

5. *Requests for Consent; Failure to Obtain Consent of All Parties; Filing of Motion.* Movant has sought, but has been unable to obtain, the consent of all parties, and hence the filing of this Motion.

For these reasons, Robert Longino prays that the Court grant him leave to appear as amicus curiae.

Respectfully submitted,

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NO. 86-870

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PHILLIPS PETROLEUM COMPANY, and
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Respondents.

BRIEF OF AMICUS CURIAE, ROBERT E. LONGINO, JR.

INTEREST OF AMICUS CURIAE ROBERT E. LONGINO, OWNER OF A SMALL PLOT OF RESIDENTIAL LAND ON THE MISSISSIPPI COAST

Robert E. Longino, Jr. is the owner of a small tract of property in Harrison County, Mississippi, located upon a branch of the Tchoutacabouffa River, a waterway subject to the influence of the tide. Robert Longino learned of this case through newspaper coverage, attended portions of the trial, recognized the implications for his property, and decided to present his views as an amicus curiae to the Mississippi trial court in order to protect his interests. He also appeared in the Mississippi Supreme Court. Having attempted to protect his land in each of the lower courts, he now appears as amicus curiae to present his views to this Court.

Robert Longino is a lifelong citizen of Mississippi, residing at Biloxi. He inherited the land here described from his father, through other relatives. Through the years, he has faithfully paid taxes on the property and saved the tax receipts. He has conveyed a portion of the acreage inherited by him to his two sons. It is a place of great natural beauty, containing a residence with large picture windows facing the water.

The interface of Robert Longino's property with the river includes meanders, inlets, and accretions typical of the area geography. A fill has been made across an inlet to allow access to a boat landing. None of these meanders, inlets, or artificial structures are shown on published maps. Yet Robert Longino could not easily afford a sophisticated survey of this property, particularly if a survey of every tidally influenced inlet is required. He believes his interests in this regard are typical of those of landowners of similar size. Thus, although situated at the opposite end of the state from the land in question in the case at bar, and although his small parcel is dwarfed by the land claimed by petitioners and respondents, he fears his interest may be harmed by the state's position here.

Robert Longino learned of this case through newspaper reports. He arranged to attend the trial of the case. This experience left him more convinced of the importance of the case to him and others similarly situated, and he therefore decided he should get his views before the trial court. This amicus curiae brief is the ultimate result.

SUMMARY OF ARGUMENT

This brief does not attempt to duplicate the detailed case law arguments expected to be made by the parties. Instead, it attempts to explain practical and legal difficulties created by the State's position for the party landowners and others, including small landowners such as Robert Longino.

The public trust doctrine is not susceptible of being understood from dictum taken out of context. For example, it is not confined only to very large bodies that are "great arms of the

sea," despite literal dicta to that effect, nor is it so unreasonably broad as to extend literally into every nook and cranny into which "the tide ebbs and flows." Adoption of the unreasonably broad, "toothpick boat" approach of the Mississippi court would plunge land titles into chaos, frustrate landowners' settled and legitimate expectations, and prevent reasonable management, maintenance or development of coastal property. The energies of virtually every coastal landowner would be channeled into resistance against the overreaching of the state, all at enormous, crushing cost.

ARGUMENT

IF INTERPRETED IN ACCORDANCE WITH THE MISSISSIPPI SUPREME COURT'S "TOOTHPICK BOAT" APPROACH, SO AS TO REACH MINISCULE NON-NAVIGABLE INLETS, THE PUBLIC TRUST DOCTRINE WOULD HAVE SERIOUS ADVERSE EFFECTS FOR SMALL COASTAL LAND-OWNERS.

A. Dicta in the Prior Decisions Should Not Be Read Out of Context to Support an Unreasonably Narrow Public Trust Doctrine; Nor Should Selected Dicta Be Used to Require This Unreasonably Broad "Toothpick" Doctrine.

The public trust doctrine is not the subject of clear statement in any one narrow phrase. It is, instead, an idea that must be understood from its historical purposes. If one were to select dicta out of context, one could support a wide variety of different approaches to the public trust doctrine, ranging from the extremely broad to the extremely narrow.

If dicta from the cases were followed literally, for example, one could reach all of the following inconsistent interpretations of the public trust doctrine:*

1. That it extends only to the "great arms of the sea." *E.g., Steamboat Magnolia v. Marshall*, 39 Miss. 109, 119 (1860). If this approach were taken, only such large bodies as the Bay of St. Louis would be included, but not such important waterways as the Jourdan River. Although supportable by dicta from the cases, this view of the public trust doctrine is probably unreasonably narrow.

2. That it extends to the great arms of the sea, plus "navigable" waters. *E.g., The Daniel Ball v. United States*, 77 U.S. (10 Wall.) 557 (1870). Navigability may be measured by various factors, such as the ability to accommodate a vessel of a certain draw, or length of the waterway, or commercial navigability in practice. Case law to support these views is available.

3. That it extends wherever "the tide ebbs and flows." *E.g., Martin v. The Lessee of Waddell*, 41 U.S. 367 (1842). A slavishly literal view of this dictum, such as the Mississippi court's "toothpick" approach, would extend the public trust doctrine even to the most microscopic and temporary inlet.

Each of these interpretations, in addition to others, can be supported by selected dicta. The point, however, is that selec-

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* Amici have not repeated the briefing undertaken by Petitioners. A full statement of the basis for there interpretations is to be found in their brief.

tion of dictum while ignoring the historical nature of the public trust doctrine would be erroneous. The Mississippi court heavily stressed the "wherever the tide ebbs and flows" dictum; it ignored case law expressly excluding "little rivers and streams," *see The Daniel Ball v. United States, supra*, and it ignored the fact that no case, either Mississippi or federal, has ever applied the doctrine to a case in which minor inlets, as opposed to great commercial waterways, were in issue.

B. Unreasonably Broad Interpretation of the Public Trust Doctrine Would Throw Coastal Land Titles into Chaos.

It is with good reason that case law excludes small streams from public trust. This case has demonstrated the colossal expense necessary to establish the boundaries of coastal land. The proof has been technical and scientific. It has required teams of specially trained personnel, and it has required lengthy expert testimony in court. This proof does not include the complexities that would be created by tracing the course of every bayou, inlet, drainage canal, pond, or other watercourse that may cross the boundary line.

A rule of law that costs more to apply than the value of the rights it controls is unlikely to be a good rule of law. This is particularly true in the area of land titles. Clear legal rules, providing for unambiguous determination of title without undue expense, are desirable. Particularly for the small landowner, the survey evidence necessary to make the required determination for every small inlet would be impracticably expensive. The result would be that the small landowner would not know what he owned and what he did not, and title to land all along the Mississippi Gulf Coast would be thrown into chaos.

Furthermore, it is desirable in the land title area to have rules establishing boundaries that are relatively permanent. A landowner might be faced with a lengthy survey and court battle to determine the boundaries of every small inlet, lasting a decade or longer, and once he had finished, there would be substantial likelihood that the course of one or more of the inlets would have shifted, necessitating the performance of the process all

over again. A rule of law requiring repeated expensive determinations, rather than settling the issue once and for all, would not be a good rule of law.

In fact, when one attempts to chart the course of the most miniscule inlets, one is faced with the problem that their exact complexion may change almost daily. A high rain might change the course of a channel. Even acquatic plants or animals might change the shape of the boundary. These examples are not far-fetched at all, when one considers that the surveyor must make judgments as to the shape of the mean high-tide line. If he is determined to chart the course of every small rivulet, as distinguished from obtaining an accurate measure of major waterways, his judgment may differ from day to day according to minor changes in natural phenomena, which thus may result in major changes in land titles. This result would be undesirable.

Furthermore, in many places along the coast, landowners have erected bulkheads obliterating evidence of small inlets, leaving land titles virtually undeterminable if they depend on every small course into which the tide may "ebb and flow." Much property along the Mississippi Gulf Coast is covered by recidential landowners in subdivisions, who are particularly likely to establish bulkheads. In such a case, it is probably easy to determine the course of the major waterway upon which the property sits, but if the landowner were required to prove that there was never a filling of the smallest kind of inlet back through recorded history, the right of most coastal residential landowners to occupy the property they reasonably believe is privately their own would be in serious jeopardy.

C. Unreasonably Broad Interpretation of the Public Trust Doctrine Would Deny Effect to the Settled, Legitimate Expectations of Small Private Landowners Concerning Their Property Boundaries.

As a consequence of the chaos into which it would throw coastal land titles, unreasonably broad interpretation of the public trust doctrine would mean that land which small private landowners believed, even quite reasonably, that they owned,

would not in fact be owned by them. Portions of land bought and paid for would not have belonged to the seller, and hence would not belong to the buyer. Citizens would be faced with loss of title to land as to which they had paid full value and could trace title back to a patent from the state. In fact, the present case is just such a case.

D. Unreasonably Broad Interpretation of the Public Trust Doctrine Would Prevent Rational Management of Land Near the Coastline.

Unreasonably broad interpretation of the public trust doctrine would mean that the landowner had no right even to enter strips of property that may traverse his land. Although a narrow inlet might run the entire length of his property, dividing it into two parcels, he would have no right to create a pathway or bridge across it, could not cut weeds or undergrowth in it, and could not perform most of the tasks that a responsible coastal landowner would perform. If structures on the land (such as the landowner's own home) were undermined by the shifting of an inlet the landowner would have no right to shore up his property. He would have no legal means of eradicating pests that might breed in the narrow strip of land that he did not own. And, of course, the filling of even the most miniscule rivulet, the alteration of its course, or its modification in any way would be illegal, and the State would presumably be under a disability even to permit it.

Additionally, applying a rule by which small inlets traversing a landowner's property were not owned by him would impede reasonably and necessary development, including that of mineral resources. Amicus curiae Robert Longino, for example, has been approached by potential oil and gas lessees interested in his property. If it were necessary to exclude small strips of land traversing his property or that of a landowner similarly situated, the result would be to fragment the land, require considerably greater expenses for lease acquisition, require more complicated operating agreements, and, in general, impose additional costs upon mineral development. The same result

would occur from either large or small surface development of the property.

The following excerpt from Porro and Teleky, *Marshland Title Dilemma: A Tidal Phenomenon*, 3 Seton Hall L. Rev. 323, 331 (1972), describes the situation in another state using the "toothpick" approach and shows the seriousness of the problem:

> Presently, a backlog of cases which relate to the tidelands problem is still awaiting a trial date, and even though recent legislation has authorized the addition of six judges to handle these matters, this is not an effective solution. A case-by-case judicial determination regarding the title to approximately 244,000 acres of tideland is an overwhelming task. Extensive proofs will be required in each instance, including comprehensive map displays, extensive soil analyses, vegetation and pollen analyses, topographical data, historical and tidal data, scientific and expert testimony regarding the natural characteristics of the marsh, artificial changes, salt water intrusion—in short, a pattern of expensive and extensive litigation.

Petitioners' marine surveyor, Paul O'Hargan, testified on the basis of comparative experience in Florida and New Jersey that a lawsuit was needed in New Jersey anytime an individual was interested in defining his title in the coastal zone, resulting in a "chaotic" situation. (Miss. Appendix 135-36).

CONCLUSION

The Court should reject the "toothpick" doctrine, reverse the decision below, and remand.

Respectfully submitted,

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OCTOBER TERM, 1986

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Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether lands underlying wholly non-navigable tidal waterbodies inured to the new states under the Equal Footing doctrine.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

No. 86-870

PHILLIPS PETROLEUM COMPANY AND
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI, AND
SAGA PETROLEUM U.S., INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

The American Land Title Association is the national trade association of title insurance companies and their agents whose 2000 members are in the business of searching, examining and insuring land titles in connection with the purchase, sale and financing of real property throughout the United States. It is no exaggeration to say that few real estate transactions take place unless one of these companies is prepared to insure the validity of the title to the property involved in the transaction. Obviously, the members of the Association must rely on the stability of land titles, which traditionally has been treated as an important principle counselling the courts against changes in real property law.

In coastal states, non-navigable but tidally-influenced backwaters, sloughs and streams have for more than a century been treated by the federal government and the states as falling outside

of the ambit of the Equal Footing doctrine. Accordingly, the underlying water bottoms have been freely transferred by federal and state grants into private ownership, and on this basis, members of the American Land Title Association have issued thousands of title insurance policies totalling billions of dollars. It is most unsettling now to be told by the Supreme Court of Mississippi that the long-since discredited ebb and flow test of navigability divests petitioners of their lands. Our fear, of course, is that this assault on private titles will extend to private grants in every coastal state, most of which have been insured by the Association's members.

Fueling these concerns, the State of California has sought to recapture as Equal Footing lands much of the long since alienated two million acres of swamp and overflowed lands granted to the state under the Arkansas Swamp Act of 1850, 9 Stat. 519, 43 U.S.C. § 981, et seq., and confirmed to it under the 1886 Act to Quiet Title to Lands in California. 14 Stat. 219, 43 U.S.C. § 987.[1] Initially, California claimed only tidally-influenced non-navigable tributaries in swamplands (or former swamplands) bordering San Francisco Bay, Humboldt Bay, Newport Bay, San Diego Bay and similar areas along the California coast.[2] Recently, however, following the reasoning adopted by the Mississippi Supreme Court, the State has extended its claim to reach non-navigable

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[1] Other public land states received grants of over 62 million acres of swamp and overflowed lands under the Swamp Land Acts of 1849, 1850 and 1860. S. Shaw & C. Fredine, *Wetlands of the United States*, U.S. Fish & Wildlife Service, Circular 39 at 5 (1971). Mississippi, the state in suit, has over three million acres of natural or reclaimed swampland, nearly all in private ownership, a substantial part of which is now subject to potential state claims. *Id.* Nor are property owners in the thirteen original states immune; they, too, have experienced challenges to title in tidally-affected non-navigable creeks and marshes. *E.g., Hirsch v. Maryland Dept. of Natural Resources*, 288 Md. 95, 416 A.2d 10 (1980); *Velsicol Chemical Corp. v. State Dept. of Envtl. Protection*, 182 N.J. Super. 575, 442 A.2d 1051 (1982); Mass. Ann. Laws ch. 91, § 1 (Law. Co-op. 1985).

[2] S. Shaw & C. Fredine, *Wetlands of the United States*, U.S. Fish & Wildlife Service, Circular 39 at 5 (1971).

backwater tributaries of the Sacramento and San Joaquin Rivers located 100 miles from San Francisco Bay, contending that they are tidally-influenced and therefore Equal Footing lands. *California ex rel. Public Works Board v. Southern Pacific Transportation Co.*, No. 277312 (Sacramento Superior Court, 1985).

If the Mississippi court's decision stands, millions of landowners will be abruptly divested of their property without any hope of compensation and states will be further encouraged to accelerate what has become a popular program of rewriting history, 100 to 150 years after the fact, to recapture lands formerly sold by them. *E.g., Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 339 (Fla. 1986), *cert. denied sub nom., Mobil Oil Corp. v. Board of Trustees*, No. 86-823 (February 26, 1987). One consequence would be a deluge of claims for failure of private title. To say the least, amicus has a giant financial stake in this issue, which spans all of the coastal states. Given this broader perspective, we believe the American Land Title Association contributes a different point of view that may be helpful to the Court in its consideration of the present case.

INTRODUCTION AND SUMMARY OF ARGUMENT

All parties and both courts below agree that the areas still in dispute—totalling a mere 42 acres—consist of lands underlying tidal, but wholly non-navigable waterbodies, being very shallow streams or drainage ditches in the marshy "backwaters" several miles from a bay opening to the sea (Bay St. Louis) and some distance from a navigable river that empties into the bay (the Jourdan River). It is apparently common ground as well that the waters overlying the lands in issue were equally non-navigable in 1817, when Mississippi was admitted to the Union.

Fortunately, the agreement about the facts carries over to the source of the governing law. Whatever alternative grounds might be available to sustain the State's claim to the water bottoms in suit, the only basis asserted here—and the only one sustained below—is the Equal Footing doctrine, as it allegedly operated to convey these tidelands to the State when it was admitted to the Union in 1817. And it is expressly conceded that federal law

determines this question, defining the scope of the constitutional grant. *See* Pet. App. 1a, 7a-8a, 10a; Miss. Br. in Opp. 18-25, 39. On the other side, petitioners pursue no argument in this Court that their title, because it precedes statehood, is exempt from the rule of the Equal Footing doctrine. Accordingly, the outcome of the case here turns, by common consent, on the "inland" reach of the Equal Footing doctrine, as defined by federal law.

At this point, the parties diverge widely. Petitioners' stance, which we support, is that by virtue of the constitutional Equal Footing principle, each state is entitled only to the beds of waterways, salt or fresh, that were navigable in fact at the date of admission to the Union. This, of course, excludes wholly non-navigable tidal waterbodies. On the other hand, the State's unqualified position, vindicated by the courts below (see Pet. App. 2a, 10a, 15a, 35a, 62a-63a, 65a-66a, 67a), is that *any* tidal area is, in law, navigable, whatever the fact (Miss. Br. in Opp. 17, 20 and n.2). In the Attorney General's own words (*id.* at 16), the State's ownership of the soil is asserted with respect to every tidal waterbody, "regardless of whether the water courses are commercially navigable, regardless of how shallow the water, and regardless of how far inland or remote from the sea." Or, to use the extraordinary metaphor of the Mississippi Supreme Court, the State's title is said to follow the tide, for any distance, through every twist and turn, no matter how narrow or shallow or circuitous the route, provided only "one may hoist a sail upon a toothpick and without interruption navigate from the navigable channel/area to land, always afloat [at mean high tide]." Pet. App. 12a. In response, we submit the following points.

1. We first establish that when Mississippi became a state in 1817 there was no settled common law rule accepted as federal law that the sovereign owned all lands underlying non-navigable waters affected by the ebb and flow of the tide. Indeed, for title purposes, federal law appears already to have repudiated the English ebb and flow test. At all events, even in England, that test did not encompass tidal waterbodies that were not in fact navigable. And that requirement of actual navigability was followed in America.

2. The proposition just stated disposes of the case. However, even assuming (contrary to our prime submission) that a literal equation of navigability with tidality was federal doctrine in 1817, the supposed expansive ebb and flow test was entirely replaced when the Court adopted the "navigability-in-fact" standard in the mid-Nineteenth Century.

3. On the hypothesis just outlined, there remains to be answered the claim that the State's submerged lands rights vested under the law as understood in 1817 and cannot be affected by a later redefinition of the Equal Footing doctrine. We reply that Mississippi neither relied on, nor had basis for relying on, the ebb and flow standard in 1817. And certainly the principle of equality between the states requires that Mississippi not be favored as compared to more recent states, admitted after the navigability-in-fact standard was in place.

ARGUMENT

To understand the issue presented, it is essential to distinguish between two quite different geographical settings—which the court below seems to have confused. The first involves the shallow tidelands immediately bordering a navigable body of water, whether it be the open sea, a bay or inlet, or the navigable stretch of a tidal river. That situation *is* comparable to a navigable freshwater lake or river with gradually sloping banks, as the Mississippi Supreme Court suggested. Pet. App. 10a-12a. In both cases, the "bed" of the waterbody that belongs to the State (unless it chooses to disclaim it) includes the foreshore or bank up to the line of mean high water, even though those "edges" are not themselves navigable.

The second physical setting involves a *discrete*, wholly non-navigable body of water, which is properly viewed as separate, albeit it is connected by a water channel to the sea or to a navigable bay, inlet, river or lake. Here, the argument by analogy to nontidal waters cuts against the conclusion reached below. Indeed, in the case of freshwater, it is well-settled that the State's title to the soil ends at the head of navigation even with respect to a single river. *E.g., Brewer-Elliott Oil & Gas Co. v. United States,*

260 U.S. 77 (1922). And the State has no claim to the bed of a wholly non-navigable tributary or distributary of a nontidal navigable stream or lake. *See United States v. Utah*, 283 U.S. 64 (1931). Although the land underlying non-navigable areas at the side of the navigation channel *is* encompassed in the state's title, the soil beneath further stretches of the river, and branches of it, is *not* when these, viewed separately, are not navigable. Plainly, one cannot measure the Equal Footing grant to the states of nontidal waterbottoms by applying the "sail upon a toothpick" test. *See* Pet. App. 12a.[3] Nor is such a test apposite in the case of tidal waters, for, as the Mississippi court rightly said, "the legal boundaries of navigable tidewaters are conceptually and functionally the same as those for navigable freshwaters." Pet. App. 11a. *See also id.* at 10a.[4]

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[3] At this point in its opinion, the court below seems to have misunderstood the "navigable-in-fact" test as applied to freshwater. *See* Pet. App. 10a-12a. Clearly, this Court's decision in *Montana v. United States*, 450 U.S. 544, 551 (1981), cited below (Pet. App. 10a), does not remotely support the "toothpick" test. Perhaps, the Mississippi court has little occasion to deal with the question because of the unusual rule of property there which concedes ownership of the bed of navigable freshwaters to the riparian proprietors. *See* Pet. App. 16a-17a. Later, however, the court appears to reverse direction, now agreeing that the beds of non-navigable freshwater streams are not embraced by the Equal Footing principle. Pet. App. 15a-16a. And, far from invoking the freshwater rule as a persuasive analogy (as it had done a few pages earlier), the court here concedes "a logical incongruity" in the asserted distinction between the rules governing tidal and nontidal waters which, the court insists, "may not be well reasoned," but is "well settled." Pet. App. 16a. Even so, it is not entirely clear whether the court is now speaking only of isolated non-navigable streams, or also including such streams when connected to a navigable watercourse.

[4] We might add that the difficulties of distinguishing between the non-navigable "edges" of a navigable waterway and a wholly non-navigable "separate" waterbody are much the same in each case and afford no argument for ignoring the difference when tidal waters are involved. Moreover, the method for drawing the dividing line between two distinct bodies of tidewater is well established. See *Knight v. United Land Association*, 142 U.S. 161, 207-208 (Field, J., concurring) (1891).

So much for the reasoning of the Mississippi Supreme Court: if we follow the standard applicable to freshwater, the result must be to exclude from sovereign ownership the soil underlying any non-navigable tidal waterbody that realistically can be seen as a distinct feature, enjoying a separate identity notwithstanding a physical connection with the sea or with a navigable bay or inlet or river. But, of course, the result reached below may be right even though the logic is flawed. *Cf.* Pet. App. 16a. And we accordingly look at the question afresh.

I

THE RELEVANT LAW IN 1817 DID NOT RECOGNIZE SOVEREIGN TITLE TO LANDS UNDERLYING NON-NAVIGABLE TIDAL WATERS IN THE STATES

The shortest solution to the case may lie in asking directly: What was the law governing the ownership of tidelands in 1817? The Mississippi Supreme Court confidently asserts two propositions on this score: (1) that the English common law rule of navigability was then controlling in this country for the purpose of determining state title to permanently or periodically submerged lands; and (2) that, under this "ebb and flow" test, the tidal character of the overlying waters was not only the necessary, but also the sufficient, condition of navigability. *See* Pet. App. 8a-10a. If either assumption is erroneous—as we believe both are—Mississippi's claim fails.

A. The Federal Law of 1817 as to the Ownership of Submerged Lands Did Not Follow the Common Law Ebb and Flow Test

As we indicate in a moment (*infra*, pp. 20-22), it is very doubtful that anyone in 1817 understood that public rights in navigable waters required public ownership of the bottoms or that any sovereign property in submerged soils appertained to the states, rather than the Nation, even where (as in Mississippi) the United States retained all the unsold uplands. Thus, it is something of a fiction to speak of the "understanding of 1817" in the present context. But this is not the only obstacle in the way of the State's claim.

The Mississippi Supreme Court to the contrary notwithstanding, it is not good history that the English tidality test (whatever its scope) prevailed throughout America in 1817. Before that date, some states had already adopted the "navigability-in-fact" standard to determine ownership of water bottoms, whether in tidal or fresh waters. *E.g., Carson v. Blazer*, 2 Binn. 475 (Pa. 1810); *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 68 (1851) (referring to the "Great Pond Ordinance" of 1641). *See generally, Shively v. Bowlby*, 152 U.S. 1, 31-32 (1894). It would not be surprising, therefore, if, except as to admiralty jurisdiction, the *federal* rule—which, of course, determines the scope of the Equal Footing grant at statehood[5]—had even then broken away from the ebb and flow test.

As it happens, there is strong evidence that this is so. The Northwest Ordinance of 1787, section 14, article IV, declared that "the navigable waters leading into the Mississippi and St. Lawrence"—although certainly not tidal—"shall be common highways and forever free." *See* Act of August 7, 1789, ch. 8, 1 Stat. 50, 52n (re-enactment). So, also, in two statutes of 1786, opening land for sale within the Territory, it is expressly provided that "all navigable [streams and] rivers" within the area now opened up "shall be deemed to be and remain public highways." Act of May 18, 1796, ch. 29, § 9, 1 Stat. 464, 468; Act of June 1, 1796, ch. 46, § 6, 1 Stat. 490, 491.[6] And like provisions, obviously reaching non-tidal waters, are to be found in a number of contemporary Acts of Congress organizing territories or admitting

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[5] Whatever doubts were once entertained on this score, the point has long since been settled. *E.g., United States v. Holt State Bank*, 270 U.S. 49, 55, 56 (1926); *United States v. Oregon*, 295 U.S. 1, 14 (1935); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 376 (1977).

[6] Significantly, in each case, the cited section goes on to stipulate that "in all cases, where the opposite banks of any stream *not navigable* shall belong to different persons, the stream and the bed thereof shall be common to both" (emphasis added). The clear implication is that the beds of navigable rivers are reserved to the United States.

new states.[7] Indeed, one example is the Enabling Act of March 1, 1817, for the admission of Mississippi, which expressly embraced non-tidal rivers, including the Mississippi River itself, as "navigable rivers and waters" that must remain "common highways" and "forever free." Act of March 1, 1817, ch. 23, § 4, 3 Stat. 348, 349.[8] *See also Bowman v. Wathen*, 3 F. Cas. 1076 (D. Ind. 1841) *aff'd on other grounds*, 42 U.S. (1 How.) 189 (1843) ("the fact of navigableness does, in no respect, depend upon the ebb and flow of the tide").

Thus, when this Court a few years later expressly rejected the ebb and flow test of navigability for all purposes in *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 454-456 (1851), *The Daniel Ball v. United States*, 77 U.S. (10 Wall.) 557, 563 (1871), and *Barney v. City of Keokuk*, 94 U.S. 324, 338 (1877), it was not radically changing American law, but rather, conforming to the rule long since adopted by the Congress. *See The Propeller Genesee Chief*, 53 U.S. (12 How.) at 457-458. It

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[7] *E.g.*, Act of March 3, 1811, ch. 46, § 12, 2 Stat. 662, 666 (Louisiana Territory); Act of June 4, 1812, ch. 95, § 15, 2 Stat. 743, 747 (Missouri Territory); Act of February 20, 1811, ch. 21, § 3, 2 Stat. 641, 642 (Louisiana); Act of April 8, 1812, ch. 50, § 1, 2 Stat. 701, 703 (Louisiana).

[8] According to *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229-230 (1845), such enabling act provisions are authorized by the Commerce Clause—which, of course, does not confine Congress to legislation touching only navigable waters, or even water. *See Kaiser Aetna v. United States*, 444 U.S. 164, 173-174 (1979). For this reason, the modern regulations of the Army Corps of Engineers tell us nothing about the scope of navigability for purposes of state title. *See United States v. Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 11. But the much broader federal commerce power, as applied to waterways, was not clear in the early Nineteenth Century. Thus, it seems the *Pollard's Lessee* Court was assuming the reach of the federal navigational servitude, here exercised, was coextensive with the State's title to submerged lands and was pointing out that the two principles could peacefully coexist. At all events, however, we have in this provision an exactly contemporaneous Congressional declaration that, in American law, the term "navigable waters" was not understood to mean only waters affected by the tide.

should be stressed, moreover, that the only decisions of this Court endorsing the "ebb and flow" test were restricting federal admiralty jurisdiction. *E.g.*, *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825); *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847). As was pointed out in *The Propeller Genesee Chief*, 53 U.S. (12 How.) at 458, these cases did not touch property rights. On that score, the United States (where it held the public lands) had from the beginning excluded the beds of non-tidal navigable waters from its grants. *See Barney v. City of Keokuk*, 94 U.S. 324, 338 (1877); *Shively v. Bowlby*, 152 U.S. at 32-33. And it seems this Court, as early as 1845, was conceding to the new states—under the Equal Footing doctrine—the beds and shores of all "navigable waters," including non-tidal rivers over which the United States could exercise its navigational servitude. *See Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) at 229-230.[9] At the least, Mississippi cannot claim reliance on any "well-settled" federal ebb and flow test governing title to submerged lands as of 1817.

B. The Common Law Ebb and Flow Test Did Not Treat As Navigable Wholly Non-Navigable Waterbodies

Even if (contrary to our submission) the "ebb and flow" standard *was* accepted as the relevant federal rule of decision in 1817, it remains to determine whether that test reserved to the

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[9] In light of like provisions in recent Enabling Acts—which expressly or necessarily encompassed non-tidal rivers as "navigable waters"—it is clear the Enabling Act for Alabama equally embraces non-tidal rivers when it stipulates that "all navigable waters within the said State shall for ever remain public highways . . . ." Act of March 2, 1819, ch. 47, § 6, 3 Stat. 489. Yet, it is apparently with reference to the same waterbodies that the Court declares the State's title to the "shores of navigable waters, and the soils under them." *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) at 229, 230.

It may be noted, also, that in *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842), the Court speaks of the original states holding "the absolute right to all their navigable waters, and the soils under them . . . ," without any express limitation to tidal waters.

sovereign all tidelands, even wholly discrete non-navigable "backwater" areas. The answer, quite clearly, is "no."

1. We look primarily to England for guidance, because that is the source of our ebb and flow test, so far as it ever prevailed here. In 1817, as today, the English common law was that—absent a grant—the Crown owns the territorial sea bed and the soil underlying arms of the sea, including navigable tidal rivers, up to the line of ordinary high tide. H. Schultes, *Essay on Aquatic Rights*, 110, 121, 132-134 (1811); *8 Halsbury's Laws of England*, 857 (4th Ed. 1974). To be sure, in the cases and the treatises, the qualifier "navigable" is sometimes omitted.[10] But that merely reflects the geographical reality that, in the British Isles, tidal areas almost invariably are navigable, at least at ordinary high tide. *See, e.g., Mayor of Colchester v. Brooke*, 7 Q.B. 339, 115 Eng. Rep. 518 (1845). It does *not* endorse the fiction that tidality is, in law, equivalent to navigability.

On the contrary, the requirement of actual navigability is explicitly set forth in one of the most comprehensive and

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[10] It is not always so, however. As early as the mid-Fourteenth Century, the Crown's original ownership of submerged lands is associated with tidal rivers that qualify as "highways" (22 *Lib. Ass.*, pls. *6, 93* (1346-1348), and in many old cases and commentaries with "navigable" waterways. *E.g., LeRoy v. Trinity House*, 1 Sid. 86, 82 Eng. Rep. 986; 1 Keb. 300, 301, 83 Eng. Rep. 958 (K.B. 1662); *Ball v. Herbert*, 3 T.R. 253-254 (1789); *Rex v. Smith*, 2 Dougl. 441, 99 Eng. Rep. 283 (K.B. 1790)); *Lord Advocate for Scotland v. Hamilton*, 1 MacQueen 46, 48 (H.L. 1852) (Scot.); M. Hale, *Prerogatives of the King* 310-311 (Selden ed. 1976); Blackstone, *Commentaries*, bk. I, ch.7; Bacon, *Abridgment*, vol. IV, *Prerogative* 3 (4th ed. 1778). In two of the modern leading cases, the rule is restricted to "all *navigable* rivers where the tide flows and reflows" or "*navigable* tidal rivers." *Gann v. Free Fishers of Whitstable*, 11 H.L.C. 192, 207, 11 Eng. Rep. 1305, 1312 (1865); *Malcomson v. O'Dea*, 10 H.L.C. 593, 618, 11 Eng. Rep. 1155, 1165 (1863) (emphasis added). And in another House of Lords decision, the *locus in quo* is described, presumably because it mattered, as "a *navigable* tidal river, or arm of the sea." *Goodman v. Saltash*, [1882] A.C. 633, 637 (emphasis added).

respected authorities, Coulson and Forbes, *On Waters and Land Drainage*:

> A public navigable river is a river which is *actually navigable and* in which the tide ebbs and flows; . . .
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> * * *
>
> Though the flux and reflux of the tide is *prima facie* evidence that a river is navigable, it does not necessarily follow, that because a tide flows and reflows in any particular place, it is therefore a public navigation . . . . If it is a petty stream navigable only at certain states of the tide, and then only for a short time, and by very small boats, it is difficult to suppose that it has ever been a public navigable channel. *Not every ditch or cutting which is reached by the tide forms part of the public navigable river*, even though it be large enough to admit the passage of a boat.

Coulson and Forbes, *On Waters and Land Drainage*, 100-101 (6th Ed. 1952) (emphasis added). *See also id.* at 506-508.

The same proposition—albeit stated with some reluctance—is reported as the settled law by S. and H. Moore in their *History of Law and Fisheries* (1903). They write (at 166-167): "The mere fact of the presence of the tidal influence does not of itself make a place navigable," and conclude that "[i]t must therefore be a question of evidence in every case whether a particular part of any tidal water is or is not navigable."[11] See also, *Earl of Ilchester v.*

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[11] It might be supposed that the definition of public "navigable waters" varied in English law depending upon whether the issue was the public's right to fish or the Crown's ownership of the bed. Not so. Although there was at one time a question whether public fishing rights extended to *non-tidal* navigable rivers (firmly answered in the negative by 1868), it was *never* suggested that those rights attached to *non-navigable tidal* areas where the Crown did not originally own the soil. On the contrary, although because of Crown grants, ancient or modern, public fishing rights might exist in waters whose soil was now privately owned (and vice versa, albeit rarely), it has always been understood that the common law viewed both the Crown right in the soil and the public

Raishleigh, 61 L.T. (N.S. 1889) 477, 479; *Sim E. Bak v. Ang Yong Huat* [1924] A.C. 429, 433-434; 49 *Halsbury's Laws of England* 214 n.3 (4th ed. 1984).

Nor is this a new doctrine, unknown in 1817. In fact, much of the language just quoted from Coulson and Forbes comes from a well-known case decided in 1825, in which the court explicitly rejected the proposition that an area affected by "the flux and reflux of the tide" was therefore navigable. *Rex v. Montague*, 4 B.&C. 598, 602, 107 Eng. Rep. 1183, 1184, per Bayley, J. (K.B. 1825). And there were earlier decisions as well. *E.g.*, *Mayor of Lynn v. Turner*, 1 Cowp. 86, 98 Eng. Rep. 980, 981, Lofft 556, 98 Eng. Rep. 796 (K.B. 1772); *Miles v. Rose*, 5 Taunt. 705, 128 Eng. Rep. 868, 1 Marsh. 313 (C.P. 1814); *See also* H. Woolrych, *A Treatise on the Law of Waters and of Sewers*, 31-32 (1830).[12]

2. Like their English counterparts, American publicists and jurists who analyzed the ebb and flow test expressly followed the English precedents which rejected the automatic equation of navigability with tidality and required, in addition, a showing of navigability-in-fact. Thus, Joseph Angell, perhaps the leading American authority on water rights in the Nineteenth Century, as early as 1826 was referring to the English common law position that the ebb and flow test was "to be restrained by a reference to public necessity and general utility," and that "the public right is to be confined to what is of public use." J. Angell, *A Treatise on*

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right to fish as coextensive in tidal areas. *See, e.g.*, M. Hale, *De Jure Maris*, ch. IV and V, reprinted in R. Hall, *Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm*, Appendix vii, ix, xvii (2d Ed. 1875); *Malcomson v. O'Dea*, 10 H.L.C. 593, 618, 11 Eng. Rep. 1155, 1165 (1863); *Murphy v. Ryan*, 2 Ir. Rep. C.L. 143, 151 (1868); *Attorney-General for British Columbia v. Attorney-General for Canada*, [1914] A.C. 153, 167-171 (Can.).

[12] This conclusion as to the scope of the English "ebb and flow" test is shared by modern scholars. *E.g.*, G. MacGrady, "The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water," 3 Fla. St. U.L. Rev. 511, 573-575, 586 (1975); J. Stevens, "The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right," 14 U.C.D. L. Rev. 195, 201 (1980).

the Rights of Property in Tide Waters and In the Soil and Shores Thereof, 127, 150 (1st Ed. 1826). *See generally*, *id.* at 125-163 and the authorities cited therein. By 1847, Angell was approvingly quoting from Mr. Justice Bayley's judgment in *Rex v. Montague*, *supra*, p. 13, and reciting an equally explicit passage from an opinion by Chief Justice Lemuel Shaw of Massachusetts:

> It is not every ditch, in which the salt water ebbs and flows, through the extensive salt marshes along the coast, and which serve to admit and drain off the salt water from the marshes, which can be considered a navigable stream. Nor is it every small creek, in which a fishing skiff or gunning canoe can be made to float, at high water, which is deemed navigable. But in order to have this character, it must be navigable to some purpose, useful to trade or agriculture.

Rowe v. Granite Bridge Corp., 38 Mass. (21 Pick.) 344, 347 (1838), quoted in J. Angell, *A Treatise on the Rights of Property in Tide Waters and in the Soil and Shores Thereof*, 89-90 (2d Ed. 1847). *See also Glover v. Powell*, 10 N.J. Eq. 211, 222-223 (Chan. 1854) J. Gould, *A Treatise on the Law of Waters Including Riparian Rights and Public and Private Rights in Waters Tidal and Inland*, 104-106, 209, and decisions cited at 104 n.5 and 209 nn.5 & 6 (2d Ed. 1891).

There is, moreover, some evidence that even where the English common law *was* misunderstood as extending Crown ownership of the soil into non-navigable tidal areas, that part of the rule was not followed. Thus, in an early Massachusetts case, Chief Justice Parker wrote:

> By the common law, the property of the sovereign is said to extend to all places where the sea ebbs and flows, whether such places are navigable or not; but it is probable the usages of our country have given a reasonable limitation to this doctrine, confining the public right to what may be of public use; so that in many little creeks into which the salt water flows, but which are incapable of being navigated at all, private property may be maintained .... There is but one principle for judicial courts to be governed by, and that is, to consider as public property all those inlets of the sea which

> are capable of sustaining vessels of any description, with their loading, for purposes really useful to trade or agriculture.

Commonwealth v. Charlestown, 18 Mass. (1 Pick.) 184, 186-188 (1822). *Accord Elder v. Burrus*, 25 Tenn. (6 Humph.) 342, 350 (1845).

All the more was such a common sense qualification of the tidality test appropriate to the geography of the Gulf Coast. One can perhaps conceive a simplistic ebb and flow rule applied on the Atlantic Ocean when the United States comprised only the original thirteen States. But, after the Louisiana Purchase of 1803, and the admission of Louisiana to the Union in 1812, it is wholly unreal to suppose that federal law treated as "navigable" every area affected by the tide. One need only consider the innumerable tidal marshes and swamps and other inaccessible, but tidally influenced, areas comprising the delta of the Mississippi River. *See Louisiana v. Mississippi*, 202 U.S. 11, 45-46 (1906); *United States v. Louisiana*, 394 U.S. 11, 63, 65-66 (1969). Indeed, the obvious non-navigability of the tidal "backwaters" of the delta, together with the obvious navigability of the mainstream of the Mississippi miles beyond any tidal affect, presumably counseled total rejection of any "ebb and flow" test for the Gulf States. *See* pp. 7-10, *supra*; 16-19, *infra*. But, at all events, no one—least of all a Mississippian—could have supposed in 1817 that tidality automatically established navigability and that non-navigable tidal backwaters were "navigable" for title purposes. Significantly, Mississippi has apparently waited 170 years to apply any such undiscriminating "tidal influence" rule to remote non-navigable tidal backwaters. *See* Pet. App. 17a-18a. It is much too late in the day to be re-inventing the federal law of navigability to accommodate the present claim.

II

THE UNDERSTANDING OF 1817 IS IRRELEVANT IN LIGHT OF THE REPUDIATION A FEW YEARS LATER (IF NOT EARLIER) OF ANY EBB AND FLOW TEST EMBRACING NON-NAVIGABLE WATERS

We have submitted that in 1817 there was no federal rule of law—"settled" or otherwise—that labelled the non-navigable tidal areas in dispute as "navigable waters" and declared the underlying soil to belong to the State as "sovereign lands" under the constitutional equal footing doctrine. Indeed, we have shown that even the English common law would not have treated these waters as "navigable" or their beds as Crown property. If that is right, Mississippi's claim fails, without more. But the State fares no better even if we assume for purposes of argument that the ebb and flow test *was* being applied in 1817, and was being applied contrary to English common law to include non-navigable waters. The reason is that any such tidality standard, if ever effective for our purposes, was wholly replaced in mid-Nineteenth Century judicial decisions by the rule requiring actual navigability, and that no sovereign rights "vested" in the interim.

A. The Ebb and Flow Test Was Wholly Repudiated in The Nineteenth Century

It is undisputed that the ebb and flow test—whatever its scope—ceased to be the sole standard of navigability for any federal law purpose after 1876, if not much earlier. As we have noted, the Court sustained the extension of admiralty jurisdiction to actually navigable freshwaters in 1851 (*The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851)), and a like ruling with respect to the reach of the federal commerce power over navigation came in 1870 (*The Daniel Ball v. United States*, 77 U.S. (10 Wall.) 557 (1871)). Finally, of immediate relevance here, the Court in 1876 confirmed that state "sovereign" lands under the Equal Footing doctrine included the bed and shores of navigable non-tidal waters. *Barney v. City of Keokuk*, 94 U.S. 324, 338 (1877). And that has remained the law. *E.g., Utah v. United States*, 403 U.S. 9 (1971); *Montana v. United States*, 450 U.S. 544, 551-552 (1981). The only question is whether the navigability-in-fact rule is applicable to non-tidal watercourses

alone, as the court below held, or whether since 1876 it has *supplanted* the pre-existing ebb and flow test for all waters, tidal as well as fresh.

1. With all deference to the dissent in *Kaiser Aetna v. United States*, 444 U.S. 164, 181-182 (1979), we believe the Court has long since repudiated the ebb and flow test for all purposes. The opinion in *The Propeller Genesee Chief* dismissed the tidality standard as "purely artificial, arbitrary, as well as unjust" (53 U.S. (12 How.) at 454, 457) and characterized earlier rulings applying that test as "erroneous." *Id.* at 456. The Court stated plainly (*ibid*):

> The jurisdiction is here made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable it was deemed to be public; and if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution.

Nowhere was any exception made for tidal waters. And this Court's decision in *The Daniel Ball* is no less clear:

> The doctrine of the common law as to the navigability of waters has no application in this country. *Here the ebb and flow of the tides do not constitute the usual test, as in England, or any test at all as to the navigability of waters.*

77 U.S. (10 Wall.) at 77, 563 (emphasis added). *See also McGilva v. Ross*, 215 U.S. 70, 78 (1909).

We are not surprised to find no express disapproval of the aspect of the old rule that allegedly treated as navigable wholly non-navigable tidal waterbodies substantially separated from the sea or its navigable arms, since, in our view, no such unqualified rule ever existed. But it is presumably not an accident that no decision of this Court condones a special standard for judging the navigability of tide-waters, or state rights in the underlying soil. In every case involving the state's title to the bed, whether beneath

non-tidal or tidal waters, the prevailing opinion refers indifferently to the same navigability-in-fact test.[13]

It is no contradiction that the Court has sometimes spoken of state title to "tidelands" without mentioning navigability at all. *See* Pet. App. 12a-13a. Those cases involved areas within, or at the edge of, obviously navigable waterbodies such as San Francisco Bay, San Diego Harbor, or Los Angeles Harbor. *E.g., Weber v. Board of Harbor Commissioners,* 85 U.S. (18 Wall.) 57 (1873); *Knight v. United States Land Association,* 142 U.S. 161 (1891); *United States v. Mission Rock Co.,* 189 U.S. 391 (1903); *United States v. Coronado Beach Co.,* 255 U.S. 472 (1921); *Borax Consolidated, Ltd. v. City of Los Angeles,* 296 U.S. 10 (1935). They merely illustrate the accepted proposition that state ownership of the bed of navigable waters, tidal or non-tidal, reaches to the line of mean high water, even though there are non-navigable areas near shore.[14] Significantly, in the very few

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[13] *E.g., Packer v. Bird,* 137 U.S. 661, 666-667 (1891); *Hardin v. Jordan,* 140 U.S. 371, 381-382 (1891); *Illinois Cent. R.R. v. Illinois,* 146 U.S. 387, 435-437 (1892); *Mobile Transp. Co. v. Mobile,* 187 U.S. 479, 482 (1903); *Oklahoma v. Texas,* 258 U.S. 574, 586 (1922); *Brewer-Elliott Oil & Gas Co. v. United States,* 260 U.S. 77, 86 (1922); *United States v. Holt State Bank,* 270 U.S. 49, 55-56 (1926); *United States v. Oregon,* 295 U.S. 1, 6 (1935); *Utah v. United States,* 403 U.S. 9, 10-11 (1971); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 374-375 (1977); *Montana v. United States,* 450 U.S. 544, 551-552 (1981).

[14] This is also the explanation of the definition of "lands beneath navigable waters" in the Submerged Lands Act insofar as it omits reference to the navigability of the overlying waters when including tidelands. 43 U.S.C. § 1301(a)(2). The legislative history of this provision indicates that the drafters were there focusing on tidal waters along the coast, seaward of all inland waters. *See* S. Rep. No. 133, 83rd Cong., 1st Sess. (1953) in 1953 U.S. Code Cong. & Ad. News 1492. *See also* the statement of Senator Cordon, one of the chief sponsors of the act:

> That definition has no other purpose than to identify the lands in question as being under nontidal waters in the upper areas *or being in tidal waters and—and I want this emphasized—outside inland waters.*

99 Cong. Rec. 2632 (emphasis added).

cases dealing with tidal areas substantially separated from the sea or its arms, the Court *has* commented on the questionable navigability of the smaller waterbody at statehood. *See Kaiser Aetna v. United States*, 444 U.S. at 178-179 & n.10; *Summa Corp. v. California ex rel. State Land Commission*, 466 U.S. 198, 206 n.4 (1984).[15] *See also San Francisco v. LeRoy*, 138 U.S. 656, 671-672 (1891).

The upshot is that there is (so far as we know) no reported decision by any federal court, much less this Court, condoning the extreme proposition put forward by the court below that the simplistic ebb and flow test governs sovereign ownership in tidal areas, even though the navigable-in-fact standard applies in all other cases. This alone is reason to doubt the correctness of the supposed rule. We need hardly add that the significantly disturbing impact on land titles in many states must caution against such a belated revision of the century old constitutional understanding.

2. If we accept the notion that an unqualified ebb and flow rule was once in vogue (even if never actually applied) but was abandoned in the Nineteenth Century, we must stress that repudiation of the old rule is necessarily retrospective so far as it affects state rights under the equal footing doctrine. This is so for two reasons. First, we are concerned with a *constitutional* principle which, absent relevant amendment of the Constitution, we must accept to have always been as it was ultimately declared. *See Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374, 381-382 (1977). Second, the state's title to the soil depends upon the navigable character of the overlying waters at the date of its admission to the Union. *Utah v. United States*, *supra*, 403 U.S. at 10. It logically follows that Mississippi's claim must be judged under the modern rule, whatever mistaken view was entertained in 1817—unless to do so would work an impermissible taking of vested rights, as appears to be suggested. *See* Pet. App. 6a-7a, 8a, 9a, 20a.

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[15] In neither case did the Court resolve the issue, because other factors mooted the point.

B. Measuring Mississippi's Equal Footing Grant By Applying the Modern Navigability-in-Fact Standard Works No Taking of Vested Rights

1. Upon its admission to the Union in 1817, Mississippi almost certainly did not understand that the State was automatically entitled to all tidelands within its boundaries, even assuming an unqualified tidality test of navigability then prevailed. This is, first, because in 1817 there was scant basis to predict this Court's later ruling in *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367 (1842)—insofar as that decision broke away from English precedents to tie much more closely public rights in navigable waters and sovereign ownership of the submerged bed,[16] or, insofar as the Court conceded to the states, rather than the Nation, one of the former prerogatives of the English Crown associated with navigable waters.[17]

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[16] The issue in the case was whether Colonial proprietors who had relinquished governmental prerogatives to the Crown had retained title to certain submerged lands underlying a tidal estuary so as to be free to convey those waterbottoms to a private purchaser. Then, as now, the law of England recognized the Crown's ownership of the soil of navigable tidewaters as a *private* attribute, freely alienable to a subject, and accordingly, would presumably have favored the view that title to the disputed waterbottoms *remained* with the proprietors and was transferred in their later conveyance. *See Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) at 421-426, (Thompson, J., dissenting). Indeed, in England, the originally sovereign property in such submerged lands (as distinguished from the public rights in the overlying waters) had, for the most part, been alienated to riparian owners. *See, e.g., Le Strange v. Rowe*, 4 F.&F. 1048, 1052, 176 Eng. Rep. 903, 905 (N.P. 1866); S.A. Moore, *History of the Foreshore*, 19 (1888). Yet, this Court, although invoking English authorities, reached the opposite conclusion, reasoning—contrary to many of those precedents—that sovereign ownership of the soil was necessary to protect the public rights of navigation and fishing. *See id.* at 413-416. *Cf. United States v. California*, 332 U.S. 19, 43-45 (1947), Frankfurter, J., dissenting. At the very least, it cannot be said that this ruling was self-evident in 1842, much less in 1817.

[17] After all, a century later, this Court held that the states relinquished their interest in the marginal seabed to the national government when the Constitution was ratified. *United States v. California, supra*, 332

There is, moreover, a more difficult obstacle to the State's claim of reliance in that Mississippi, as a new "public land" state, could not directly benefit from the ruling in *Martin v. Lessee of Waddell*, but acquired its submerged lands only by virtue of the principle laid down in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845)—a decision which would have seemed even less inevitable to the most astute Mississippian of 1817. Putting aside the special factual and procedural problems in *Pollard's Lessee*,[18] the Court there ruled that the Equal Footing principle—although mandating equality in governmental prerogatives only, not landed wealth—required the automatic transfer of navigable waterbottoms from the United States to a new state upon its

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U.S. at 34-36; *United States v. Texas*, 339 U.S. 707, 717-718 (1950); *United States v. Maine*, 420 U.S. 515, 522-523 (1975). By a parity of reasoning, it might have been supposed that the soils underlying "arms of the sea," and the appurtenant tidelands, equally inured to the Nation when the "more perfect Union" was established.

Indeed, the regulation of navigation, an English Crown prerogative, had fallen to the national government, not to the states. By 1817, the Congress had already acted on the assumption that the Commerce Clause empowered it to regulate navigation—or to assure against its obstruction—on waters useful in interstate or foreign commerce, presumably including all navigable tidal rivers connected to the sea. *See* statutes cited at 8-9, *supra*. And, within a very few years, the Court would vindicate this notion of a federal "navigational servitude." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). *See also Wilson v. United States*, 30 F. Cas. 239, 245 (C.C.D. Va. 1820)(No. 17,846), per Marshall, C.J. Since the Court viewed ownership of the soil as being tied to such governmental functions, the natural consequence would have been to concede that also to the Nation.

[18] Among the unusual facts were that the land, although tideland at statehood, was now dry. *See Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) at 220. If that resulted from alluvion, the decision presumably should have been against the State, given the situation of the parcel on the edge of Mobile Bay. *See California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 286 n.14 (1982). *See also Pollard's Lessee v. Hagan*, *supra* at 230 ff., Catron, J., dissenting.

admission to the Union. As the dissent commented (*id.* at 231),[19] this was especially puzzling in a constitutional regime that apparently permitted the United States to retain, and sell for its own benefit, the previously unappropriated *uplands* within a new state. *See, e.g., VanBrocklin v. Anderson*, 117 U.S. 151, 167-168 (1886). So far as we are aware, that mystery remains unexplained. *See United States v. California*, 332 U.S. 19, 30-31 (1947). At the least, it is difficult to maintain that the rule in *Pollard's Lessee*—which came as a surprise to Congress—was anticipated by Mississippi when it entered the Union under a formal compact that bound the future state to "forever disclaim all right and title to the waste and unapporpriated lands," which were to "remain at the sole and entire disposition of the United States." Act of March 1, 1817, ch. 23, § 4, 3 Stat. 348, 349.[20]

2. Moreover, even if we misapprehend the clairvoyance of the first Mississippians, it is perfectly clear the State never acted to its detriment on the assumption that it owned the tidelands in suit—whether by undertaking costly improvement works or even by granting leases, the proceeds of which might have to be reimbursed to the lessee. *Cf. United States v. Louisiana*, 394 U.S. 11, 73 n.97 (1969); *United States v. Maine*, 420 U.S. 515, 528 (1975). In these circumstances, it would seem wholly artificial to treat any mistake of law in 1817 as irrevocably vesting title to backwater tidelands. State property rights do not normally accrue simply because of an erroneous view of constitutional doctrine—even when, unlike here, the false premise was shared for

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[19] Justice Catron had made the point in *City of Mobile v. Eslava*, 41 U.S. (16 Pet.) 234, 249 (1842), without any expressed disagreement from his Brethren. For the background of *Pollard's Lessee*, see C.B. Swisher, *The Taney Period 1836-64*, 750-753 (1974) (being volume V of the *Oliver Wendell Holmes Devise History of the Supreme Court.*)

[20] Again, it may not have been immediately apparent to all why the United States should be charged with a solemn obligation to preserve unblemished title to navigable waterbottoms, segregated from the uplands because of their association with the ancient public rights of navigation and fishery, only to hand over these submerged lands to the new state for sale to the highest bidder, or even free disposition to the riparian proprietors.

many decades by all branches of federal and state governments. *E.g., United States v. California, supra,* 332 U.S. at 29-30, 36-38, 39-40. The "windfall" quality of such a result is not, however, the only, or the most serious, objection.

3. It must be remembered that the whole basis for Mississippi's claim is the Equal Footing principle. That State was entitled to be admitted to the Union on an equality with the original states and other states previously admitted. But, of course, the later states are likewise entitled to equal treatment. Yet, states joining the Union in the latter part of the Nineteenth Century or the Twentieth, are governed by the modern navigable waters rule. The problem is obvious, and so is its solution: to apply the true constitutional standard in *all* cases, even if that disappoints reasonable expectations among the original or early admitted states. *See United States v. Maine*, 420 U.S. at 521-527; *United States v. Texas*, 339 U.S. 707, 717-719 (1950). Fortunately, this result unsettles no private titles and requires no action from the State. Mississippi is simply held to an equality with all states, as the Constitution requires.[21]

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[21] It is worth noting that, according to the court below, Mississippi was entitled, if it chose, to take advantage of the "new" constitutional rule under which the states own the soils beneath navigable nontidal waters. Pet. App. 16a. We agree, but must comment that this seems very like having the best of both worlds if the State is also to retain the benefit of the supposed old rule encompassing the beds on non-navigable tidal waterbodies.

CONCLUSION

For the reasons stated, the judgment of the Mississippi Supreme Court should be reversed insofar as it affirms a decree vindicating the State of Mississippi's claim to lands underlying non-navigable tidal waterbodies on the ground that such waterbottoms inured to the State under the Equal Footing doctrine.

Respectfully submitted,

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No. 86-870

In The
Supreme Court of the United States
October Term, 1986

PHILLIPS PETROLEUM COMPANY AND
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI, AND
SAGA PETROLEUM U.S., INC.,
Respondents.

On Writ of Certiorari
to the Supreme Court of Mississippi

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, FLORIDA, HAWAII, LOUISIANA, NORTH CAROLINA, OREGON, TEXAS, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, by expanding the common law defintion of navigability to apply to inland waters, non-tidal but navigable in fact, this Court deprived the states of rights heretofore existing in their tidal waters.

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INTEREST OF AMICI

The interest of California and other states in this issue is clear. This Court has consistently held that the absolute property in and dominion and sovereignty over all soils under the tide water belongs to the states as an attribute of their sovereignty. (*Weber v. Board of Harbor Commissioners,* 85 U.S. (18 Wall.) 57, 65 (1873); accord, *United States v. Mission Rock Co.*, 189 U.S. 391 (1903).) This title passes not by grace of Congress, but by virtue of the United States Constitution. (*Oregon* ex rel. *State Land Board v. Corvallis Land & Gravel Co.*, 429 U.S. 363 (1977).) Although individual states fashioned their own rules accepting or renouncing these lands in whole or part, few of them gave up their tidal waters, whether or not they were navigable in fact. For tidelands are among the most important lands the state controls, and their disposition historically has been restricted both by common law and state constitutional limitations.

SUMMARY OF ARGUMENT

This case presents a novel and unprecedented challenge to state title to the beds of tidal waters. For nearly one hundred and fifty years this Court has consistently ruled that the individual states have complete title to the lands beneath tidal waters up to the line of mean high tide. Because there are thousands of miles of rivers and lakes in this country that are navigable in fact far above the flow of the tide, this Court has also extended the limits of state ownership to include the beds of freshwater

rivers and lakes that are navigable in fact. Petitioners now seek to reverse the direction of this juridical flow, arguing that state title to tidal waters should be limited to those which are also navigable in fact. There is no basis in precedent or policy for this new limitation. As a matter of federal constitutional law the equal footing doctrine, confirmed by Congress in the Submerged Lands Act, vests title to the beds of all tidally influenced *and* navigable waters in the individual states as an inherent aspect of state sovereignty. Accordingly, the decision below should be affirmed.

The doctrine of state sovereign ownership of submerged lands was developed by this Court from the common law of England. The common perception of American courts at that time was that under common law the crown held all tidal waters: because they were incapable of cultivation, because under concepts of civil law they were incapable of ordinary ownership, and because they constituted part of the seas over which the crown exercised admiralty power.

"Navigability" in English law, was a term of art based on whether waters were subject to tidal influence. Even in early times, however, some American courts recognized that the English definition of navigability was too restrictive; and that the same protections of public ownership should extend to the non-tidal rivers and lakes that constituted "common highways" for the new nation. This concept—that waters navigable in fact should be navigable in law—was adopted by this court in determining admiralty jurisdiction, in applying the commerce clause and, eventually, in determining the boundaries of sovereign ownership

under the equal footing doctrine. (*Barney v. Keokuk*, 94 U.S. 324, 337-338 (1876).)

Over a hundred years after these germinal decisions, this Court is now asked to decide whether, in extending the definition of navigability to non-tidal waters navigable in fact, it intended to repeal the old tidality test, or to merely supplement it. Neither the decisions of this Court nor the acts of Congress suggest an intent to effect such a repeal and to withdraw tidelands from the states—if indeed that is constitutionally possible.

Any other ruling would wreck havoc on established rules of property based upon the long-held and reasonable expectations of the states that title to the beds of tidally influenced waters vested in them at statehood. Nothing in the decisions of this Court respecting sovereign lands suggests that the extension of the doctrine of sovereign ownership to inland waters that are navigable in fact amounts to a repeal of the long-standing common law rule that all tidal waters were navigable in law. In the Submerged Lands Act, Congress unambiguously retained the distinction between tidal waters and lands beneath waters navigable in fact, and confirmed the states' title to both. Although individual states may adopt more restrictive rules of property, this Court has not. In California, as in other states, over a hundred years of litigation and legislation have brought about a painfully fashioned scheme of titles, depending on whether lands were tidal or non-tidal; navigable or non-navigable. It is too late in the day to unravel these legal skeins and introduce a new and novel limitation on the test of navigability for title.

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ARGUMENT

Nearly 150 years ago, Justice Catron described the issue now once again before this Court as "the most important controversy ever brought before this court, either as it respects the amount of property involved, or the principles on which the present judgment proceeds . . . ." (*Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 235 (1845).) This is so because it has to do with basic principles of federalism: the relationship of state and federal sovereigns. In *Pollard's Lessee*, Justice Catron made essentially the same argument that petitioners have raised here. It was rejected by this Court in 1845, and one might well have assumed the point to have been settled.

The rule under which states claim their tidal waters is one basic to our constitutional system. It is based on the premise that "when the Revolution took place the people of each state became themselves sovereign" (*id.* at 410), and "all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States." (*Shively v. Bowlby*, 152 U.S. 1, 15 (1893).) Thus, "[t]he shores of navigable waters, and the soils under them, were not granted by the Constitution of the United States, but were reserved to the states respectively." (*Pollard's Lessee v. Hagan, supra*, 44 U.S. (3 How.) 212, 230.) These interests, acquired by the original colonies and all subsequently admitted states, are consistently characterized as inherent attributes of sovereignty, "so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign . . . or transfer of sovereignty itself." (*U.S. v. Oregon*,

295 U.S. 1, 14 (1935).) Thus, since the tidal waters at issue here passed to the states as states, as part of their constitutional birthright, this Court will necessarily be cautious in holding that the subsequent extension of the definition of navigability acted to divest those interests from states that chose to retain them.

I

THE STATES ACQUIRED SOVEREIGN TITLE TO ALL LANDS UNDERLYING TIDEWATERS UPON THEIR ADMISSION INTO THE UNION

Every decision of this Court affirming the states' sovereign interest in tidal waters has done so without reference to navigability in fact. Otherwise, tidal flats and other lands whose sovereign nature was never questioned until now would be re-subjected to an entirely new test for title. The tidelands at issue in the basic holding of *Pollard's Lessee v. Hagan, supra,* 44 U.S. (3 How.) 212, were not only non-navigable in fact; they had been filled for years. (*Id.*, 3 How. at 220.)

The basic rule has often been restated:

> "Upon the admission of California into the Union upon equal footing with the original States, *absolute property in, and dominion and sovereignty over all soils under the tidewaters within her limits passed to the State,* with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the General government." (*Weber v. Board of Harbor Commissioners, supra,* 85 U.S. (18 Wall.) at 65-66; emphasis added.)

Whether, under English common law, "navigability" was a term of art and actually dependent on the ebb and flow of the tide, or whether navigability in fact was the English test may be debatable (e.g., MacGrady, The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don't Hold Water, 3 Florida State U.L. Rev. 511 (1975); see also cases cited in Petitioner's Brief, pp. 17-23),[1] but in any event, the early American courts were justified in assuming, as they did,[2] that under the English common law, all waters subject to tidal influence were held by the crown in trust for the people.[3] Thus, as one com-

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1. It may be, as one authority suggests, that English common law embraced *two* legal fictions relating to navigability: Any tidal water was "navigable in law" for title determinations, whereas waters "navigable in fact" were subject to the public's right to navigate irrespective of ownership of their beds. (4 R. Clark, Waters and Water Rights 105 (1970 ed.); J. Gould, Treatise on the Law of Waters 100, 101 (3d ed. 1900), citing *Commonwealth v. Vincent*, 108 Mass. 441, 447 (1871).)

2. Chancellor Kent, one of the dominant commentators of the time, repeatedly emphasized this version of the rule, stating that "in the common-law sense of the term, those (rivers) only were deemed navigable in which the tide ebbed and flowed . . . ." (3 J. Kent, Commentaries on American Law 413 (14th ed. 1896).) "[A] right of fishery in *navigable or tide waters*, below high water mark, is a common right . . . ." (*Id.*, at 418 (emphasis added); see *Elwood v. City of New York*, 450 F.Supp. 846, 861 (1978): "[T]idal water was by definition 'navigable,' and fresh water 'non-navigable.'"

3. The common law rule under which the original colonies received their lands as successors to the Crown, and the equal footing doctrine under which states later admitted gained the same rights as an attribute of their sovereignty, are not to be confused with the public trust doctrine, under which each state fashions its own rules as to how these sovereign lands are to be administered. See *Appleby v. City of New York*, 271 U.S. 364 (1926); cf. Petition for Writ of Certiorari, pp. 11, 12, 15.) The question presented by this case is whether title to these lands passed to Mississippi and other states under the equal footing doctrine. Their subsequent status as trust lands must be determined under state law.

mentator wrote, the king, by common law, had title to the bed of the Thames "as high as the tide flowed," and a grant of the sovereign's interest to the City of London included "all the issues, breaches, creeks, and grounds overflown, as far as the water ebbeth and floweth . . . ." (H. Schultes, An Essay on Aquatic Rights 21, 22 (1839 ed.).) This assumption rested variously on the theory that in Great Britain rivers ceased being useful for navigability beyond the zone of tidal influence (*The Propeller Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 454-455 (1851); that such rivers were considered to be a "branch of the sea," (H. Schultes, *supra*, at 50); that the King's admiralty jurisdiction extended to all tidal waters; and that lands covered entirely or periodically by salt water were incapable of cultivation or use. (E.g., *Shively v. Bowlby*, *supra*, 152 U.S. at 57; J. Gould, *supra*, at 39 n. 1.) As a result, navigability was determined by whether the lands in question were subject to tidal influence, and rivers were considered navigable to the extent of tidal flows. (H. Schultes, *supra*, at 50.)

But the rights and jurisdiction of states as sovereigns were not governed by "the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions." (*Pollard's Lessee v. Hagan*, *supra*, 44 U.S. (3 How.) at 229.) In the early nineteenth century, state courts showed an increasing realization that the rivers of the United States that were navigable in fact should be treated as sovereign waters irrespective of their tidality. (E.g., *Carson v. Blazer*, 2 Binn. 475 (Pa. 1810) (Susquehanna River): "[S]ince the revolution, no part of the common law has been adopted except that which was proper for our country." (*Id.*, at 477.) (Accord, *Bullock v. Wilson*, 2 Port. 436 (Ala. 1835) (Coosa

River); *Collins v. Benbury,* 25 N.C. (3 Ired.) 277 (1842) (Albermarle and Pamlico Sounds); *Ingram v. Threadgill,* 14 N.C. (3 Dev.) 59 (1831) (Pedee River); and *Cates v. Wadlington,* 1 McCord 356 (S.C. 1822) (Enoree River).) Some states, however, retained the English common law rule and applied the tidal test. (See *Adams v. Pease,* 2 Conn. 481 (1818); *Middletown v. Pritchard,* 4 Ill. (3 Scam.) 519 (1842); *Commonwealth v. Chapin,* 22 Mass. (5 Pick.) 203 (1827); *Berry v. Carle,* 3 Me. (3 Green.) 269 (1825); *Scott v. Willson,* 3 N.H. 321 (1825); *Commissioners of the Canal Fund v. Kempshall,* 26 Wend. 404 (N.Y. 1841); *Gavitt v. Chambers,* 3 Ohio 495 (1828); and *Hayes v. Bowman,* 22 Va. (1 Rand.) 417 (1823).) (See generally, Selvin, The Public Trust Doctrine in American Law and Economic Policy, 1789-1920, 1980 Wisc. L.Rev. 1403, 1407, n. 10.)

What is important for these purposes is the perception American courts had of the law at the time the equal footing doctrine evolved. That perception was that the English test depended wholly on tidality. As Justice Field flatly stated in his "lodestone" Illinois Central decision, "In England the ebb and flow of the tide constitute the legal test of the navigability of waters." (*Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387, 435 (1892); see also, *Weber v. Harbor Commissioners, supra,* 85 U.S. (18 Wall.) at 65: "By (the common) law the title to the shore of the sea, and of the arms of the sea, and in the soils under tidewaters is, in England, in the king, and, in this country, in the State." (Accord, *Barney v. Keokuk, supra,* 94 U.S. 324, 336; W. Burby, Handbook on the Law of Real Property, § 18, p. 45 (3d ed. 1965), citing Gould on Waters (3d ed.) § 42; *Shively v. Bowlby, supra,* 152 U.S. 1, 11:

"By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King."

In *Packer v. Bird*, 137 U.S. 661, 668-669 (1891), Justice Field quotes the Pennsylvania court's description of the common law rule with apparent approval:

> "We are aware that by the common law of England such streams as the Mississippi, the Missouri, the rivers Amazon and Platte, the Rhine, the Danube, the Po, the Nile, the Euphrates, the Ganges and the Indus, were not navigable rivers, but were the subject of private property, whilst an insignificant creek in a small island was elevated to the dignity of a public river, because it was so near the ocean that the tide ebbed and flowed up the whole of its petty course. The Roman law, which has pervaded Continental Europe, and which took its rise in a country where there was a tideless sea, recognized all rivers as navigable which were really so, and this common sense view was adopted by the early founders of Pennsylvania, whose province was intersected by large and valuable streams, some of which are a mile in breadth." (*Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112, 120 (1863).)

Indeed, tidality was the common law test of navigability when this Court expanded the definition for admiralty purposes. (*The Propeller Genessee Chief v. Fitzhugh*, *supra*, 53 U.S. (12 How.) at 456-457.)

The American view of English common law was set forth clearly in *Shively v. Bowlby*, *supra*, 152 U.S. 1, 49: citing Justice Taney's classic opinion in *Martin v. Waddell*, 41 U.S. (16 Pet.) at 409-411 (1842) (emphasis added):

> "The title and dominion of the *tide waters* and of the soil under them, in each colony, passed by the royal charter to the grantees as 'a trust for the common use of the new community about to be estab-

> lished;' and, upon the American Revolution, vested absolutely in the people of each State 'for their own common use, subject only to the rights since surrendered by the Constitution to the general government.' "

Or, as Justice Bradley put it in *Hardin v. Jordan,* 140 U.S. 371, 381 (1891): "The title to the shore and lands under tide water . . . 'is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation & fishery.' " (*Shively v. Bowley, supra,* 152 U.S. at 49.)

The title and dominion of the tidewaters and the lands under them are held by the United States for the benefit of the whole people, and, as this Court has often said, "in trust for the future States." (*Ibid.*)

Early state decisions applying the tidality test to determine title to waters which were not navigable in fact are common. In *Wright v. Seymour,* 69 Cal. 122, 10 P. 323 (1886), the California Supreme Court was confronted with a patent describing lands meandered along the Russian River. The river at the location in question was tidal but concededly not navigable in fact. Nevertheless the court held that under the common law test, the State owned its bed:

> "In the sense of the common law, Russian River, at the point indicated, is as completely a navigable stream as the Hudson at New York or the Thames at London." (*Id.,* at 124.)

Such lands under tidal waters belong to the state by virtue of its sovereignty, the court held. (*Id.,* at 126.) In *Murdock v. Stickney,* 62 Mass. (8 Cushing) 113, 115 (1851) the court held that a creek within the ebb and flow of the tide was navigable in "its technical sense" since all tidal waters are navigable under common law, and thus did not fall within a statute allowing construction of water mills

on non-navigable streams upon payment of an annual fee. The Connecticut court held that the tidal "flats" adjoining an arm of the sea were in public ownership. (*Simmons v. French*, 25 Conn. 346, 352 (1856).)

The American courts' concept of English common law was clear. As the Iowa court put it:

> "[T]he ebb and flow of the tide was, at common law, the most usual test of navigability, yet it was not necessarily the only one . . . But on the other hand, there are in England and in this country, many arms of the sea, which, though not navigable in fact, are so legally." (*McManus v. Carmichael*, 3 Iowa 1, 27 (1856).)

In characterizing the Mississippi River as navigable in the title sense, the court made it clear that the tests of tidality and navigability in fact were concurrent ones; that the later test did not displace the former one:

> "It is true that this legality (navigability) attaches to some waters that which do not possess the requisite quality in fact, but this arises from their relation to the high seas, and to admiralty, and to the difficulty of making a hundred exceptions." (*Id.*, at 30.)

Later opinions of this Court reinforce the conclusion that in extending the doctrine of "navigability" to include waters above the head of tide, the Court did not reject the settled doctrine that states have sovereign ownership of lands subject to the ebb and flow of the tides. For example, it is stated:

> "This *right of the States to regulate and control the shores of tide waters, and the land under them*, is the same as that which is exercised by the Crown in England. In this country the same rule *has been extended* to our great navigable lakes, which are treated as inland seas; and also, in some of the States, to navigable rivers, as the Mississippi. . . ." (*Hardin v. Jor-*

dan, supra, 140 U.S. 371, 382, cited in *Shively v. Bowlby, supra,* at 46; emphasis added.)

In *Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363, the court cited *Weber v. Board of Harbor Commissioners, supra,* 85 U.S. (18 Wall.), 65-66, reaffirming the doctrine of *Pollard's Lessee:*

> " 'Upon the admission of California into the Union upon equal footing with the original States, *absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper,* subject only to the paramount right of navigation over the waters . . . .' [Emphasis in original]
>
> "In *Barney v. Keokuk,* 94 U.S. 324, 338 (1877), the Court *extended the doctrine to waters which were nontidal but nonetheless navigable,* consistent with its earlier extension of admiralty jurisdiction to such waters in *The Propeller Genesee Chief v. Fitzhugh,* 12 How. 443 (1852)." (*Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. at 374-375; emphasis added.)

A tidal water is navigable at law throughout its mudflats, inlets and estuaries. As the court observed with respect to the Sacramento River: " 'There is but one river, and that a navigable one. The waters on each side of the island constitute parts of one navigable stream.' " *Packer v. Bird,* 71 Cal. 134, 135, 11 P. 873 (1886), aff'd 137 U.S. 661 (1891).)[4]

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4. Indeed, counsel for the amicus American Land Title Association shared this undisputed assumption in an earlier proceeding, in which he stated:

"[M]y understanding is that for purposes of the *Pollard* rule, all tidal waters are treated as navigable and a determination of actual navigability is therefore not necessary as it would be with respect to lakes or other nontidal inland waters." (Argument of then Deputy Solicitor General Louis B. Claiborne, in *U.S. v. Alaska,* No. 84 Original, vol. XVII, transcript of oral argument on questions 6, 8, 9, 10 and 11 at p. 2433 (March 4, 1985).)

Petitioners' contentions that navigability in fact is now the exclusive test of sovereign ownership could, pursued to its logical extreme, drive state title in any navigable water below the mean high water mark to some undefined depth at which navigation could take place. Recognizing the problems inherent in this theory, amicus American Land Title Association has suggested that the court draw a distinction between the "shallow tidelands immediately bordering a navigable body of water" comprising the bed of the water, which amicus would concede to the state even though they are not themselves navigable in fact, and "discrete" wholly nonnavigable bodies of water, to which the states would have no claim even though they may be connected to navigable waters. (Brief of American Land Title Association at 5.) Not only are the authorities cited by this proposition inapplicable to the states' ownership of tidal waters, but the distinction suggested was rejected by this Court in *Mann v. Tacoma Land Co.* (1894) 153 U.S. 273. There, mudflats described by petitioners as subject to tidal ebb and flow "*presumably by the unnavigable waters of some bay or inlet of the waters of Puget Sound*" were held to be tidelands held by the State as sovereign. (*Id.* at 278, 283; emphasis added.) The *Mann* decision alone should be dispositive of this case.

Early state constitutions made similar assumptions. Thus, California's 1879 Constitution provides:

> "No individual, partnership, or corporation, claiming or possessing the frontage or *tidal lands* of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people

thereof." (Cal. Const., art. X, § 4 (formerly Cal. Const., art. XV, § 2; emphasis added.)

Only a few years later, the California Supreme Court described the tidelands, which could be granted only subject to the public trust, as including potentially "the entire sea beach from the Oregon line to Mexico and the shores of every bay, inlet, estuary, and navigable stream as far up as tide water goes and until it meets the lands made swampy by the overflow and seepage of fresh water streams." *People v. California Fish Co.*, 166 Cal. 576, 591, 138 P. 79, 85 (1913).) The California Civil Code, enacted in 1872, states: "The State is the owner of all land below tide water, and below ordinary high water mark, bordering upon tide water within the State; of all land below the water of a navigable lake or stream; . . ." (Cal. Civ. Code § 670 (West 1982).)

Washington's state constitution provides:

> "The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes. . . ." (Wn. Const., art. 17, § 1.)

Washington's Supreme Court has recently stated that this provision "was but a formal declaration by the people of rights which our new state possessed by virtue of its sovereignty" (citing *Robinson v. Silver Lake Ry. & Lumber Co.*, 153 Wash. 261, 274, 279 (P. 1109 (1929)), "which declaration had the effect of vesting title to such lands in the state. (Citation.)" (*Caminiti v. Boyle*, 107 Wash.2d 662, 666, 732 F.2d 989, 993 (1987).)

Alaska's state constitution similarly includes submerged and tidal lands within the "state public domain." (Alaska Const., art. 8, § 6.) "Tideland" is defined by

statute in that state as land which is periodically covered by tidal water between the elevation of mean high and mean low tides" without reference to navigability. (Alaska Stat. 38.05.965(21).)

And in *Jackvony v. Powel*, 67 R.I. 218, 21 A.2d 554, (1941), the Rhode Island court held that a provision of that state's 1843 Constitution guaranteeing to the people "all the rights of fishery, and the privileges of the shore, to which they have heretofore been entitled" gave them a right to pass along the foreshore between high and low tide lines. (*Id.*, at 222, 21 A.2d at 556.)

II

THE PROPERTY LAW OF THE STATES DEVELOPED IN RELIANCE ON THEIR CONTROL OF TIDAL WATERS. A CHANGE IN THE RULES OF LITTORAL OWNERSHIP WOULD CAUSE ENDLESS CONFUSION

Substantial and complex bodies of state property law have developed on the long-established assumption that the beds of tidal waters are sovereign lands. In *Shively v. Bowlby, supra,* 152 U.S. 1, this Court emphasized the principle controlling here: once admitted to the union, a state acquires title to all the lands beneath its navigable waters as an inherent attribute of sovereignty. "Whether, as rules of property, it would now be safe to change these doctrines (arising out of the confusion of the original classification of nontidal waters as non-navigable) where they have been applied . . . is for the several states themselves to determine." (*Barney v. Keokuk, supra,* 94 U.S. at 338, quoted in *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. at 379.) The states are free to adopt common law rules. They may decline jurisdiction over the beds of non-tidal waters, as does

New Jersey.[5] They may retain jurisdiction over waters both tidal and navigable in fact, or they may draw their boundaries at high water or low water.

Many states have made grants of their tidelands, and the nature and effect of the state patents again is construed under state law. Such a grant, depending on the jurisdiction, may constitute a complete fee. It may pass title subject to a retained public trust interest, it may pass revocable title, or it may be totally void. (See *Stevens*, The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right, 14 U.C. Davis L.Rev. 195, 214-220 (1980); Comment, The Tideland Trust: Economic Currents in a Traditional Legal Doctrine, 21 U.C.L.A. L.Rev. 826 (1974).)

Only one federal question properly exists: What was the nature of the lands that passed to the state by

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5. In *Cobb v. Davenport*, 32 N.J.L. (3 Vroom) 369, 379 (1867), the court, in considering the question of the title to the bed of a lake, said:

> "The tidal test, as distinguishing waters in which the property is in the sovereign, from those in which it is in private individuals, was said on the argument to be founded in no principle. Many of the rules of the common law, by which rights are ascertained and property is acquired, held, and transmitted, if subjected to such criticism would be found to be equally devoid of principle. As a rule by which individuals may be guided in ascertaining what rights belong to them, as a portion of the public, and what are exclusively within the domain of private ownership, it has the merit of uniformity and certainty, and is easy of application. The criterion suggested in the argument, of holding all rivers which are navigable in fact to be public rivers, and those which are not navigable in fact to be private rivers, is wanting in that accuracy and certainty at which the law aims. It can only be made certain by the addition of some arbitrary rule, such as depth of water, quantity of tonnage, or the like, and even then is still open to the objection that no man can tell whether he is exercising a public right, or trespassing upon a private right, without entering upon an investigation, and thus the way is open for discussion and disturbances."

virtue of its sovereignty? (*State Land Board v. Corvallis Sand & Gravel Co., supra*, 429 U.S. at 377; *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 517 (1839).) The states represented herein have held and administered their tidelands and navigable nontidal waters under a complex of state and federal statutes and case law for well over a century. The public land system administered by the federal government recognized the existence of several classes of land, and dealt with them separately: the uplands, commonly referred to as the "public lands," were subject to entry and ownership under a variety of laws; the swamp and overflowed lands were subject to private ownership, and the beds of navigable waters and tidelands were held by states subject to a common law public trust. (See, e.g., M. Oxfield, Federal Land Grants To the States With Special Reference to Minnesota (unpublished paper, Univ. Minnesota 1915).)[6] The United States had no power to convey the tidelands and beds of navigable waters (*Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 17-19 (1935)), and even in the territories, as the court observed in 1876, "wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water." (*Barney v. Keokuk, supra*, 94 U.S. at 338.) To this day, the United

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6. Contrary to the implication raised by the amicus American Land Title Association, California is not claiming swamp and overflowed lands to which it is not entitled. Amicus' characterization of *California v. Southern Pacific Transportation Co.*, No. 277312 (Sacramento Superior Court 1985) is misleading in that respect. In that case both parties accepted the proposition that title was dependent on whether or not the property was tideland. The parties agreed that the State was vested with the lands in question on admission, if they were tidelands. And the State did not dispute the SP's legal title to the swamp and overflowed lands adjoining the tidelands. (Statement of Decision 3.) Finally, the State conceded that the tideland patents granted to SP were valid under California law, subject to a retained public trust interest. (*Ibid.*; see *People v. California Fish Co., supra*, 166 Cal. 576, 138 P. 79.)

States Bureau of Land Management declines to survey tidelands on the grounds they are not federal public domain lands. The Bureau's Manual of Surveying Instructions (Bureau of Land Management Tech. Bull. No. 6) states at page 4: "Tidelands which are covered by the normal daily overflow are not subject to survey as public land." Tidelands are defined in the Manual as follows:

> "Tidelands are coastal areas situated above mean low tide and below mean high tide, particularly as they are alternately uncovered and covered by the ebb and flow of the daily tides. As a part of the bed of navigable waters, such lands belong to the States. *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1844). Tidelands are mentioned here to stress their distinction from swamp and overflowed lands. Coastal 'salt marshes' that are covered by the daily tide are tidelands and not subject to survey. On the other hand, coastal marshes that are not covered by the daily tide are swamp and overflowed lands within the meaning of the grants and are subject to survey." (*Id.*, at 179.)

The Corps of Engineers has long operated under a definition of "navigable waters" based on either tidal ebb and flow or susceptibility for commerce, including "mudflats, sandflats, wetlands, (and) sloughs. . . ." (33 C.F.R. § 323.2 (July 1, 1986); see *United States v. DeFelice*, 641 F.2d 1169, 1175 (5th Cir. 1981): "Requiring tidal water bodies to meet the test for non-tidal, navigable in fact water bodies . . . is really to eliminate the ebb and flow test."

It is too late in the day to contend that the beds of tidal waters passed with upland grants in states that claimed them as sovereign lands. Land ownership in the states represented here is predicated on a settled system of law in which the effect of government patents is fully known and recognized. The effect of such grants depends on the nature of the lands granted. A patent to tidelands,

depending upon the applicable state law, may be invalid, may pass full title, or may pass title subject to a retained public trust interest. (E.g., *Ward v. Mulford*, 32 Cal. 365 (1867).)

Many titles have been adjudicated and settled on the premise that land bordering on tidewater, below the ordinary high water mark, belongs to the state. (E.g., *Ross v. Burkhard Investment Co.*, 90 Cal.App. 201, 207, 265 P. 982, 985 (1928).) This conclusion was warranted by this Court's consistent declarations that "grants of the government for lands bordering on tide water . . . only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted enures to the State within which they are situated. . . ." (*Hardin v. Jordan, supra*, 140 U.S. at 381.)

III

THE STATES' TITLE TO TIDAL LANDS WAS CONFIRMED BY THE SUBMERGED LANDS ACT

Congress, which so consistently has dealt with tidelands differently than other types of lands, continued to recognize the difference in the Submerged Lands Act of 1953. (43 U.S.C.A. §§ 1301-1315 (1982). The genesis of this act was the submerged lands litigation, in which this Court declared that the federal government, and not the states, had "paramount right" in the three-mile marginal belt. (E.g., *United States v. California*, 332 U.S. 19, 38 (1947).)

Even there, the court noted:

> "The Government does not deny that under the Pollard rule . . . California has a qualified ownership of lands under inland navigable waters . . . and *even tidelands down to the low water mark.*" (*United*

States v. State of California, supra, 332 U.S. at 30; emphasis added.)

The submerged lands cases eventually led to enactment of the Submerged Lands Act, in which Congress relinquished paramount federal rights to the three-mile belt to the coastal states by:

(1) declaring the seaward boundary of coastal states to be three geographical miles seaward of their coastlines (43 U.S.C.A. § 1312);

(2) confirming to the states "title to and ownership of the *lands beneath navigable waters*" within their boundaries (43 U.S.C.A. § 1311(a); emphasis added); and

(3) Defining "lands beneath navigable waters" as follows:

> "(a) The term 'lands beneath navigable waters' means—
>
> "(1) all lands within the boundaries of each of the respective States which are covered by *nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union*, or acquired sovereignty over such lands and water thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;
>
> "(2) *all lands permanently or periodicallly covered by tidal waters up to but not above the line of mean high tide* and seaward to a line three geographical miles distant from the coast line of each such State . . . ." (43 U.S.C.A. § 1301(a); emphasis added.)

In *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), this Court stated:

> "[T]he [Submerged Lands] Act creates no new rights for the States in the beds of their inland waterways . . . Since the Act does not extend to the States any interest beyond those afforded by the equal-foot-

> ing doctrine, the State can no more base its claim to lands unnecessary to a navigational purpose on the Submerged Lands Act than on that doctrine." (*Id.*, at 324-325; emphasis added.)

The court reaffirmed its interpretation of the effect of the Submerged Lands Act in *California* ex rel. *Lands Comm'n. v. U.S.*, 457 U.S. 273, 283 (1982), stating: "The act . . . confirmed the title of the States to the tidelands up to the line of mean high tide." Thus, Congress has recognized that inland submerged and submersible lands "permanently or periodically covered by tidal waters up to . . . the line of mean high tide" are sovereign state lands, acquired at the time of statehood under the equal footing doctrine. This unambiguous language leaves no room for statements of legislative history offered in the amicus brief of American Land Title Association at 18, note 14.

Petitioner's theory, if adopted, would raise grave questions as to the authority of states to fashion their own rules of property, one of the principal attributes of sovereignty. As this Court observed, "Under our federal system, property ownership is not governed by a general federal law, but rather by the law of the several states . . . ." As Chief Justice Marshall said, "[I]n construing the statutes of a state on which land title depends, infinite mischief would ensue should this court observe a different rule from that which has long been established in the state. . . ." (*McKeen v. Delancy's Lessee*, 9 U.S. (5 Cranch) 22, 32 (1809).) This is particularly true with respect to real property, for even when federal common law was in its heyday under the teachings of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), an exception was carved out on the local law of real property. (*Id.*, at 18.) (*State Land*

Board v. Corvallis Sand & Gravel Co., supra, 429 U.S. at 378, 379.)

A new rule excluding lands beneath tidal waters from state sovereign title would wreak havoc on established state rules of property and effectively rescind the rules first set down by this Court in *Martin v. Waddell* and *Shively v. Bowlby.* Not only would those states in which such lands are held be deprived of them; but the status of titles conferred by tideland patents covering such lands would be thrown into disarray.

A new, uniform federal rule could replace state rules of property such as Hawaii's, under which the state holds the seashore to the line of vegetation. (*Application of Ashford,* 50 Haw. 314, 316-317, 440 P.2d 76, 78 (1968)); or that of Texas, where the state, under civil law principles, holds to a higher high tide, as distinguished from the mean high tide of the common law, for lands granted before Texas adopted the common law in 1840 (*Luttes v. State,* 159 Texas 500, 537, 324 S.W.2d 167, 191 (Tex. 1958)), or that of North Carolina, which has prohibited the grant or private entry of lands subject to the "ebb and flow of the sea; then as high as salt water is found, so high the tide, the flow of water from the sea, ascends." (*Collins v. Benbury (II)*, 27 N.C. 118, 126 (1884); 1777 N.C. Session Laws, ch. 114, § 10; 1715 N.C. Session Laws, ch. 6.) It could extinguish state rules under which public trust rights to dry sand areas have been held to exist (*Matthews v. Bay Head Improvement Assn.,* 95 N.J. 306, 326, 471 A.2d 355, 364 (1984), cert. den. 469 U.S. 821); or where, under a statute over 300 years old, the upland owner holds to low tide within a hundred rod limit. (*Commonwealth v. Alger,* 61 Mass. (7 Cush.) 53, 67 (1851).)

And it could change the law of Texas, under which the state holds title to the beds of streams at least 30 feet wide. (*State v. Bradford*, 50 S.W.2d 1065 (Tex. 1932).)

Historically, grants with the purpose of divesting the sovereign of its interests, held on behalf of the people, have been viewed by federal and state courts alike with disfavor. (*Illinois Central Railroad v. Illinois*, 146 U.S. 387, 453-454 (1892); *Shively v. Bowlby*, *supra*, 152 U.S. at 10, 13; *People v. California Fish Co.*, *supra*, 166 Cal. at 592, 138 P. at 86.) Thus, in *Martin v. Waddell*, *supra*, 41 U.S. (16 Pet.) 414, the court said:

> "[I]t would require very plain language . . . to persuade us that the public and common right of fishing in navigable waters which has been so long and so carefully guarded in England . . . was intended, in this one instance, to be taken away."

Or as the California court put it:

> "It is not to be assumed that the state, which is bound by the public trust to protect and preserve this public easement and use, should have intentionally abdicated the trust as to all land not within the very limited areas of the reservations, and should have directed the sale of any and every other part of the land along the shores and beaches to exclusive private use, to the destruction of the paramount public easement, which it was its duty to protect, and for the protection and regulation of which it received its title to such lands." (*People v. California Fish Co.*, *supra*, 166 Cal. at 591, 138 P. at 85.)

The contentions of petitioner and its amici lead into a quagmire from which there is no ready egress. Rather than providing certainty, their adoption would lead to a new series of land grabs, renewing the hopes of a multitude of claimants holding deeds to tidelands surveyed and patented in good or bad faith in the "gilded age" of

the nineteenth century. (See, e.g., G. Nash, The California State Land Office, 1858-1897, 27 Huntington Library of No. 4 (Aug. 1964); *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 504, 476 P.2d 423, 455, 91 Cal.Rptr. 23, 55 (1970).)

Traditionally, each state has had a choice as to whether to claim all of the tidal lands within its jurisdiction, or to adopt a different boundary. Each state has been free to deal with its tidelands "according to its own views of justice and policy . . . ." (*Shively v. Bowlby, supra*, 152 U.S. at 26.)

IV

PUBLIC TRUST INTERESTS PROVIDING THE BASIS FOR SOVEREIGN OWNERSHIP APPLY TO ALL TIDAL WATERS

California and other states share an interest in the beds of tidal waters acquired as an inherent attribute of sovereignty. These lands are held in public trust for the people of the states: for the historic purposes of commerce, fishery and ecological preservation. These trust purposes go far beyond those of historic navigability in fact. In earliest times, the trust existed not only for commerce, but for fishery as well. In fact the initial controversies leading to enunciation of the public trust doctrine in this country were based on the right to utilize oyster beds, not channels of commerce. (*Arnold v. Mundy*, 6 N.J.L. (1 Hal.) 1 (1821);[7] *Martin v. Waddell*, *supra*,

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7. *Arnold v. Mundy*, *supra*, 6 N.J.L. 1, revolved around an oyster bed in the mouth of the Raritan River, on land "about fifty yards below common low water mark (over which the tide ebbed and flows); and . . . frequently bare at the full and change of the moon, and commonly, though not always so, in the fall and spring . . . and . . . the space between it and the shore is what they call a mud flat, commonly covered with water, but not a channel for vessels or other craft usually plying in the river." (*Id.*, at 66.)

41 U.S. (16 Pet.) 367.) Today the value of oyster beds—and the more extended values of nonnavigable tidal waters—are well known. They constitute breeding grounds and a source of food for innumerable species. They act as filters, protecting adjacent water from pollution. Their function as part of the sea is undeniable. (Cf. *Just v. Marinette County*, 56 Wis.2d 7, 16-17, 201 N.W.2d 761, 768 (1972).)

These are lands early decisions characterized as being common to all the people "for the purpose of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of water and its products (a few things excepted) . . . ." (*Arnold v. Mundy, supra*, 6 N.J.L. at 77; see also *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158 (Mass. 1863), construing the right of fishing and fowling in great ponds.)

Today, the public trust is described in similar terms:

> "The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs . . . the state is not burdened with an outmoded classification favoring one mode of utilization over another . . . There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is preservation of these lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenary and climate of the area." (*Marks v. Whitney*, 6 Cal.3d 251, 259-260, 491 P.2d 374, 98 Cal.Rptr. 790 (1971); accord, *Borough of Neptune City v. Avon by the Sea*, 61 N.J. 296, 294 A.2d 47 (1972).)[8]

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8. Of course the extent and nature of the public trust remains a question of state law, to be determined by the individual states just as much as those states are free to determine their own rules of property. (See generally, Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L.Rev. 471 (1970) and cases cited therein.

As population pressures have grown, scientific studies have shown increasingly the value of shrinking estuarine areas as sources of food, cover, nesting and spawning areas for fish, shellfish, waterfowl and animals. It is the sovereign's trust duty "to protect the people's common heritage of streams, lakes, marshlands and tidelands. . . ." (*National Audubon Society v. Los Angeles Dept. of Water and Power,* 33 Cal.3d 419, 441, 658 P.2d 709, 724, 189 Cal. Rptr. 346, 361 (1983), cert. den. 464 U.S. 977 (1983).)

As the Oregon court stated:

> "Because the trust is for the public benefit, the state's trustee obligation is commonly described as the protection of specified public usages, e.g., navigation, fishery and, in more recent cases, recreation. The severe restriction upon the power of the State as trustee to modify water resources is predicated not only upon the importance of the public use of such waters and lands but upon the exhaustible and irreplaceable nature of the resources and its fundamental importance to our society and to our environment. These resources, after all, can only be spent once. Therefore, the law has historically and consistently recognized that rivers and estuaries once destroyed or diminished may never be restored to the public and, accordingly, has required the highest degree of protection from the public trustee." (*Morse v. Oregon Div. of State Lands,* 34 Or. App. 853, 581 P.2d 520, 524 (1978), aff'd., 285 Or. 197, 590 P.2d 709 (1979) [permit to fill 32 acres of estuary for airport runway found inconsistent with the public trust].)

Massachusetts has taken a similar position. In holding that lands in the Boston waterfront were impressed with the public trust coincidental with state sovereign ownership, the federal court stated:

> "For centuries, land below the low water mark has been recognized as having a peculiar nature, sub-

ject to varying degrees of public demand for rights of navigation, passage, portage, commerce, fishing, recreation, conservation and aesthetics." (*United States v. 1.58 Acres of Land*, 523 F.Supp. 120, 122 (D. Mass. 1981).)

This formulation, the court states:

> "[R]ecognizes the division of sovereignty between the state and federal governments—those aspects of the public interest in the tideland and the land below the low water mark that relate to commerce and other powers delegated to the federal government are administered by Congress in its capacity as trustee of the jus publicum (fn), while those aspects of the public interest in this property that relate to non-preempted subjects reserved to local regulation by the states are administered by state legislatures in their capacity as co-trustee of the jus publicum." (*Id.*, at 123.)

Tidelands are vital to the existence of the estuarine fish and shellfish which pass their lives in estuaries or else require estuaries as nursery grounds. Fish and shellfish may feed directly upon plant material washed into the estuary in the form of detritus, or they may feed upon smaller invertebrates that use the plant material and detritus as a major food source. (*Wetlands: Their Use and Regulation*, at 57-60 (U.S. Congress, Office of Technology Assessment, 1984).)

In addition to providing food for estuarine and freshwater fisheries, these lands protect the fisheries by maintaining water quality. As water flows through them, pollutants such as phosphates and nitrates are filtered. Toxic substances are trapped by adsorption to tidal soils. (*Wetlands: Their Use and Regulation, supra* at 48-50.)

The old English courts justified the crown's interest in tidal waters on the basis that they were part of the sea. We are becoming more aware daily that the tidal waters

are essential parts of the sea; for the propagation of wildlife, and to cleanse polluted waters. The wisdom of the eighteenth century public trust duty to hold these waters for "fisheries" as well as commerce, becomes increasingly apparent as scientific knowledge grows.

CONCLUSION

Faced with such a consistent and strong judicial tradition of construing grants of sovereign land against the grantee, it is daring indeed to suggest that judicial decisions extending the common law of navigability to nontidal waters had the effect of limiting application of the equal footing doctrine to waters navigable in fact. And if they did, would they have retroactive effect? Would tidal waters be vested in the original 13 colonies, as they were in the Crown, but not in states admitted later, after the more expansive doctrine developed? The "navigability in fact" doctrine appears to have emerged no earlier than 1810, at best, in *Carson v. Blazer*, 2 Binn. 475 (Pa. 1810) and its first application under the admiralty clause occurred in 1851. (*The Propeller Genessee Chief v. Fitzhugh, supra*, 53 U.S. (12 How.) at 457.) This Court first recognized applicability of the "navigability in fact" test to titles received under the equal footing doctrine in *Barney v. Keokuk, supra*, 94 U.S. 324. If the tidal navigability rule has been superseded by one or more of these decisions, would such a supersession be applied with total retroactivity to all the states, or only to states admitted after any one of those significant jurisdictional dates?

Petitioner here has raised an unprecedented attack on an established rule of property; one involving the lands

the states acquired as an inherent attribute of their sovereignty. To change the rules at this date would shake state property systems to their very foundations. Neither history nor reason dictate such a result.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PHILLIPS PETROLEUM Company *et al.*,
Petitioners,

versus

STATE OF MISSISSIPPI *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

**BRIEF *AMICUS CURIAE* of the THIRTEEN ORIGINAL STATES:
NEW YORK, NEW HAMPSHIRE, MASSACHUSETTS, CONNECTICUT, NEW JERSEY, PENNSYLVANIA, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA, and RHODE ISLAND
Joined by the
COASTAL STATES ORGANIZATION
IN SUPPORT OF RESPONDENTS.**

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-870

PHILLIPS PETROLEUM COMPANY *et al.*,
Petitioners,

versus

STATE OF MISSISSIPPI *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

BRIEF *AMICUS CURIAE* of the ORIGINAL THIRTEEN STATES:

NEW YORK, NEW HAMPSHIRE, MASSACHUSETTS, CONNECTICUT, NEW JERSEY, PENNSYLVANIA, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA, and RHODE ISLAND

Joined by the
COASTAL STATES ORGANIZATION

IN SUPPORT OF RESPONDENTS.

STATEMENT OF INTEREST OF *AMICI CURIAE* IN THE OUTCOME OF THIS CASE

This case presents the question of what Public Trust shorelands Mississippi received when she entered the Union

in 1817 on an equal footing with the thirteen original States. The Mississippi Supreme Court concluded that the shorelands so received and held in trust are those lands subject to the ebb and flow of the tide and below the mean high tide line as it existed in 1817. This ruling is based on the Equal Footing Doctrine; when Mississippi entered the Union she did so on an equal footing with the thirteen original States, "*viz*, as each one of the thirteen held its tidelands and navigable waters in public trust ... ." *Cinque Bambini Partnership v. State*, 491 So. 2d 508, 512 (Miss. 1986).

The question of how "each one of the thirteen held its tidelands and navigable waters in public trust" is one that the thirteen original States are in the best position to answer. This question is not a simple one, for the thirteen original States were not uniform in the extent and manner to which they held their shorelands in trust for all the people. "[T]he nature and degree of such rights and privileges [in the shorelands] differed in the different Colonies, and in some were created by statute, while in others they rested upon usage only." *Shively v. Bowlby*, 152 U.S. 1, 18 (1894). Nonetheless, it is fundamental to answer this question in order to ascertain what the remaining 37 "new" States received by force and effect of the Equal Footing Doctrine. Answering this question is the central focus of this brief.

The Coastal States Organization, a representative organization of the Governors of the coastal States, recognizes the importance of this case to all of its member States. The Coastal States Organization, having no vested interests in the outcome of this case, has served to facilitate the development of this brief *amicus curiae* among the thirteen original States.

The outcome of this case is of major importance to all coastal States. Indeed, the Court is dealing here with an issue directly related to the constitutional sovereignty of

the States. A reversal of the Mississippi Supreme Court decision could affect the interests of all coastal States in thousands upon thousands of acres of their tidelands, heretofore understood to be held either in sovereign ownership, or subject to the public shoreland trust servitude.

Petitioners state, and we agree, that "[T]he 13 original states are the divining rods of the equal footing doctrine." Petitioners' Brief at 23. Because of the obvious truth of the statement, we, as the thirteen original States that reserved their shorelands when adopting the Constitution of the United States 200 years ago, submit this brief *amicus curiae* to present our view with one voice as to the nature and extent of our reserved shoreland trusts which were, by force and effect of the Equal Footing Doctrine, perpetuated as each new State entered the Union.

SUMMARY OF ARGUMENT

The thirteen original States, upon adoption of the United States Constitution 200 years ago, reserved a public trust interest in, at a minimum, all of their shorelands subject to the ebb and flow of the tide below the mean high tide line, and held them in trust for the benefit of all the people. The States held these trust shorelands not only for the public's use for navigation, but for other purposes, including commerce, land transportation, fishing, fowling, sustenance and bathing. Entering the Union upon an equal footing with the thirteen original States, each of the new States received in trust those shorelands subject to the ebb and flow of the tide, regardless of the navigability of the adjacent waters. Each new State, in its own trustee capacity, upon entering the Union had the authority to define both the nature of her sovereignty over, and the physical boundaries of, her trust shorelands to the same extent as the thirteen original States.

ARGUMENT

A. At the time of the adoption of the Constitution, the thirteen original States reserved those lands subject to the ebb and flow of the tide, regardless of the navigability of the adjacent waters, at least up to the mean high tide line. As the corpus of this trust was originally funded by the thirteen original States, so has it been perpetuated by the Equal Footing Doctrine to the 37 States that have since joined the Union.

"The original States withheld their tidelands and navigable waters from the United States at the time of adoption of the Constitution." *Cinque Bambini Partnership v. State*, 491 So. 2d 508, 512 (Miss. 1986). *See also Pollards' Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228 - 230 (1843); *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867); *Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 65 - 66 (1873); *Knight v. U.S. Land Association*, 142 U.S. 161, 183 (1891); *Shively v. Bowlby*, 152 U.S. 1, 26 (1894); *United States v. Mission Rock Co.*, 189 U.S. 391, 404 (1903). As each one of the thirteen original States held its tidelands and navigable waters in trust the United States created like trusts in each new State. *Montana v. United States*, 450 U.S. 544, 551 (1981). Thus, the question of the extent, and the nature of the public uses, of the shorelands withheld in trust by the thirteen original States at the time the United States Constitution was adopted must be answered in order to determine with any assurance what the 37 "new" States, such as Mississippi, received by force and effect of the Equal Footing Doctrine.

To answer this question it is necessary to look at the English common law, because "the common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several Colonies and States, or by the

Constitution and the laws of the United States." *Shively v. Bowlby*, 152 U.S. 1, 14. In other words, "upon the American Revolution, all the rights of the Crown and Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States." *Id.* 14 - 15. *See also Martin v. Waddell*, 41 U.S. 367, 410 (1842); *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 30 (1869). However, "since the revolution, no part of the common law has been adopted except that which was proper for our country." *Carson v. Blazer*, 2 Binn. 475, 477 (Pa. 1810). Thus, because it provided the foundation for colonial law but was subject to change by the colonies after the Revolution, the English common law is of central, but not controlling, importance.

This Court focused on the English common law of the tidelands in the case of *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10 (1935), looking specifically at the "extent of the right of the Crown to the seashore." Discussing the case of *Attorney General v. Chambers*, 4 De G.M. & G. 206 (1789), this Court noted the conclusion of Lord Chancellor Cranworth that "the medium high tide between the springs and the neaps" must be treated "as bounding the right of the Crown." *Borax Consolidated, Ltd. v. Los Angeles, supra* at 25.

The *Chambers* case, decided two years after the United States Constitution was ratified, suggests that the thirteen colonies also held sovereign control over their seashores up to the mean high tide line. As noted, however, after the Revolution each colony was free to modify the common law as necessary with respect to the uses and physical character of her shorelands. The *Chambers* case further suggests that the colonies determined what shorelands they held according to the tidal influence on those lands, and not according to the "navigability" of the adjacent waters. These suggestions withstand scrutiny when the thirteen original State laws and decisions are reviewed with an eye

towards establishing what shorelands they reserved at the time the Constitution was adopted.

Massachusetts: The Massachusetts Bay Colony modified by ordinance in 1641 its common law of the shorelands. Prior to this ordinance, the colony abided by the English common law that "all arms of seas, coves, creeks, &c., *where the tide ebbs and flows*, are the property of the sovereign..." *Commonwealth v. Charlestown*, 18 Mass. (1 Pick.) 180, 182 (1822) (emphasis added). "[T]his right of the sovereign extends to ordinary high-water mark, so that the shore, which is the space between high-water and low-water, belongs also to the sovereign." *Ibid. See also Storer v. Freeman*, 6 Mass. 435, 437 (1810). Thus, by the common law "he to whom a house lot was granted which was bounded upon the sea, would be the proprietor only as far as high water mark," for below this all lands subject to the ebb and flow of the tide were public lands. *Commonwealth v. Charlestown*, 18 Mass. at 182.

In order to induce private parties to erect wharves below the high water mark, the colonial legislature passed the ordinance of 1641 amending the common law. *Storer v. Freeman*, 6 Mass. at 437. This ordinance granted to adjacent upland owners title to the shore down to the mean low tide mark or one hundred rods (about 1650 feet) from the mean high tide mark, whichever was less. *Id.* Public rights to fishing, fowling, and navigation in the intertidal zone were, however, reserved from the grant. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 67-68 (1851). Thus, the public retained a direct proprietary interest in the intertidal zone in addition to its sovereign power to regulate private use of this area for the common good. *Id.* at 82-88.

The public's proprietary and sovereign rights in the intertidal zone vested in the Commonwealth at the time of the Revolution, and were not transferred to the United States by the subsequent adoption of the Constitution. *Id.*

at 82, *citing New Orleans v. The United States*, 35 U.S. (10 Pet.) 662, 737 (1836); *Pollards' Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1843). Since that time, Massachusetts courts have consistently upheld the public's rights to fishing, fowling and navigation in the intertidal zone. Thus, for example, a private party cannot exclude the public from taking shellfish on land in the intertidal zone, irrespective of whether he holds title to such land. *Weston v. Sampson*, 62 Mass. (8 Cush.) 347, 355 (1851). *See also Butler v. Attorney General*, 195 Mass. 79, 84, 80 N.E. 688, 689 (1907) (upholding the public's right to "fishing and free fowling" in the intertidal zone).

The Commonwealth's dominion over the public rights in tidal waters is not dependent on whether the waters are navigable-in-fact. See *Commonwealth v. Vincent*, 108 Mass. 441, 447 (1871) recognizing "no restriction upon [the Commonwealth's] authority to regulate the public right of fishing" in the tide waters and great ponds that "are not navigable from the sea for any useful purpose".

New Hampshire: In New Hampshire, "[i]t is well established law" that "tide waters are public waters. As such they are within the power of the Legislature to make such laws as the public good may require." *Sibson v. State*, 110 N.H. 8, 10, 259 A.2d 397, 399 (1969) (cases cited therein omitted). *See also Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 4, 25 A. 718, 719 (1889). According to New Hampshire case law, tidewaters "are those in which the tide ordinarily ebbs and flows, including the sea, and also bays, rivers, and creeks, so far as they answer this description. A body or stream of water cannot be considered as tidal merely because, under unusual circumstances, the level of the water is affected by the tide, nor is the amount of salt in the water material." *Sibson v. State*, 110 N.H. at 10, quoting 2 Tiffany, *Real Property* sec. 659 (3rd ed.). While navigability-in-fact is the appropriate test to determine whether freshwater lakes and streams are public waters, since New Hampshire's earliest days the action of

the tide has furnished "a convenient means of locating the boundary of the largest reservoir of public water." *Concord Manufacturing Co. v. Robertson*, 66 N.H. at 5.

Besides recognizing tidewaters as public waters, the New Hampshire Supreme Court confirmed a century ago the long-standing common law rights of the public in New Hampshire's shoreland extending seaward from the mean high-water mark. In 1889, Chief Justice Doe wrote in *Concord Manufacturing Co. v. Robertson*, *supra*, as follows:

> In *Nudd v. Lamprey* [an unreported case] decided in the county of Rockingham at the December term, 1847, it was held that the provision of the Massachusetts ordinance [of 1641] relating to the shore of tide-waters has not been adopted and is not in force in this state; and there is no ground on which that case can be overruled. The introduction of any other line than high-water mark as the marine boundary would overturn common-law rights that had been established here, by a usage and traditional understanding of two hundred years duration, before they were questioned in *Nudd v. Lamprey*.

Id. at 27, 25 A. at 730-731. As to the extent of the public trust, the Court in *Concord Manufacturing* concluded that the same dictates of justice and reason—which mandated that the shores and arms of the sea be held in fee by the State for common use—also vested a private right of reasonable use in owners of the adjoining land. *Id.* at 18; *Sibson v. State*, 110 N.H. at 10, 259 A.2d at 400. This private right is in turn:

> [s]ubject to the paramount right of the State to control [public waters] reasonably in the interests of navigation, fishing and other public purposes. In other words, the rights of these owners are burdened with a servitude in favor of the State which comes into operation when the State prop-

> erly exercises its power to control, regulate, and utilize such waters.

Sibson v. State, supra, citing State v. Stafford Co., 99 N.H. 92, 97, 105 A.2d 569, 573 (1954); *see Concord Manufacturing Co. v. Robertson, supra* at 5.

Rhode Island: Rhode Island case law consistently establishes that title to shorelands below the high water mark, and subject to the ebb and flow of the tide, lies in the State. "In this state, at common law, the fee of the soil in tide waters below high water-mark is in the state." *Bailey v. Burges*, 11 R.I. 330, 331 (1876); *Brown v. Goddard*, 13 R.I. 76, 81 (1880); *Folsom v. Freeborn*, 13 R.I. 200, 204 (1881); *Gerhard et ux. v. Seekonk River Bridge Commissioners*, 15 R.I. 334, 335 (1886); *Allen v. Allen*, 19 R.I. 114, 115 (1895); *Jackvony v. Powel*, 67 R.I. 218, 226 (1941). "This right of the State is held, however, by virtue of its sovereignty, and in trust for all the inhabitants, not as a private proprietor. The public rights secured by this trust are the rights of passage, of navigation and fishery, and these rights extend ... to all land below high water unless it has been so used, built upon or occupied, as to prevent the passage of boats, and the natural *ebb and flow of the tide*."-(Emphasis added). *Allen v. Allen*, 19 R.I. at 116; *Jackvony v. Powel*, 67 R.I. at 226.

Rhode Island's Constitution, ratified in 1843, protects certain rights of the public in the use of the State's extensive shores, most prominent of which are the shores along Narragansett Bay. Article I, section 17 of the Rhode Island Constitution provides: "The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have heretofore been entitled under the charter and usages of this state."

The shores held in trust in Rhode Island, and upon which the public's "privileges" are constitutionally protected, are those "shores bordering on tidewaters and lying between the lines of mean high tide and mean low tide

. . ." *Jackvony v. Powel*, 67 R.I. at 225. The fact that the waters adjacent to the shoreland are or are not navigable has never been a requisite criteria for determining what tidelands of Rhode Island are held by the State in trust.

Connecticut: By the Charter of 1662, Charles II granted to the Colony of Connecticut title to the shores of the sea. The physical extent of this grant and the competency of the king to make such a conveyance were undoubted.

> "A river, where the tide ebbs and flows, is an arm of the sea; and the shore is that space of ground, which is between ordinary high water and low water mark. The title of the king, *prima facie*, to all ports and arms of the sea to high water mark, and to the soil thereof, has long been established law; and ... it is settled, that he may grant the property of the soil between high and low water mark to a subject or corporation."

East Haven v. Hemingway, 7 Conn. 186, 198 (1828).

Adoption of the English common law regarding public ownership of all lands below "high water mark" has been continually reaffirmed in Connecticut case law. "The doctrine of the common law is, that the right to the soil of proprietors of land on navigable rivers extends only to high water mark; all below is *publici juris* - in the king, in England. That is the law in Connecticut; for we have no statute abrogating it." *Chapman v. Kimball*, 9 Day 38, 40 (1831). *See also Nichol's v. Lewis*, 15 Conn. 137, 143 (1842) ("land between high and low water mark belongs to the public"); *Simons v. French*, 25 Conn. 346, 352 (1856) ("In Connecticut, it is now settled that the public, representing the former title of the king, is the owner in fee of such flats up to the high water mark"). This same line of early cases established that the owner of adjoining upland had the right to wharf out upon or otherwise occupy

the land beyond high water provided he did not interfere with navigation.

As evidenced by the writings of a leading State jurist of the times, Connecticut subscribed to the "legal" definition of navigability. That is, arms of the sea and rivers were considered navigable "as far as the sea flows and re-flows." 1 *Swift Digest* 109 (1822). Within the context of colonial times, navigable waters as discussed in Connecticut case law referred to tidal influence rather than navigability-in-fact. For example, in *Adams v. Pease*, 2 Conn. 481, 484 (1818), the court stated that "every river, where the sea ebbs and flows, is by the common law, considered as navigable; and all rivers not thus distinguished, are not navigable."[1]

Thus, In Connecticut, title in the lands subject to the ebb and flow of the tide and below the high water mark was held by the State. It is these tidally influenced shorelands she reserved upon adoption of the Constitution.

New York: It has been long established that New York's shoreland rights were defined without reference to navigability, but rather to the tidal influence on the lands. Thus, the power of the State extends over waters which "though not navigable in fact are deemed navigable in law ... .

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[1] It must be noted that petitioners cite two Connecticut cases for the proposition that not all tidal streams are navigable. See Petitioners Brief, at 26. Both *Wethersfield v. Humphrey*, 20 Conn. 218 (1850) and *Groton v. Hurlburt*, 22 Conn. 178 (1852), however, were concerned not with navigable waters, *per se*, nor with a determination of public tidelands, but with obstructions to navigation which would interrupt commerce. Navigability, navigable waters and the standards by which they are defined have always varied depending on the application of such determinations. It is no more appropriate to apply the narrower commerce clause/navigable water standard to the determination of public tidelands, than it would be to apply the broader regulatory/navigable water standard enunciated by this Court in defining navigable waters under the Clean Water Act. *See United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455 (1985).

Over such waters the power of the State extends." *State v. Bishop*, 359 N.Y.S. 2d 817, 820, 46 A. 2d 654, 656 (1974).

As early as 1829 an appellate court of New York held that the navigable rivers and arms of the sea where the tide regularly ebbs and flows belong to the people. *Lansing v. Smith*, 4 Wend. 9 (1829). An 1832 decision held that "as a general rule, a grant of lands bounded on tide waters extends only to ordinary high-water mark." *Wismall v. Hall*, 3 Paige Ch. 313, 315 (N.Y. 1832). In a review of the law in 1925, the New York State Attorney General advised that the people have common-law rights, constituting a public trust, to the land below the mean high water line over which the tide ebbs and flows. *Matter of Tidal High-Water Line*, 33 New York State Dept. Repts. 415 (1925).

It is also well established in New York "that a conveyance by a governmental agency of land fronting on a navigable body of water conveys title only to the high water line." *Do'phin Lane Association v. Town of Southampton*, 72 Misc. 2d 868, 882, 339 N.Y.S. 2d 966, 981 (1971). "The foreshore, or land under the waters of the sea and its arms, between high and low-water mark, is subject, *first*, to the *jus publicum* - the right of navigation, and when the tide is out, the right of access to the water for fishing, bathing and other lawful purposes to which the right of passage over the beach may be a necessary incident." *Tiffany v. Town of Oyster Bay*, 234 N.Y. 15, 20, 136 N.E. 224, 225 (1922).

The authority of the State of New York to convey land under the tide waters is accordingly limited. "The title of the state to the seacoast and the shores of tidal rivers is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign right, and it has frequently been said that a trust is engrafted upon this title for the benefit of the public of which

the state is powerless to divest itself." *Coxe v. State*, 144 N.Y. 396, 405-406, 39 N.E. 400, 402 (1895). This case overturned an act of the Legislature which gave a corporation authority to reclaim and drain wetlands and tidewater marshes on or adjacent to Staten Island and Long Island. The court noted that this restriction, although not enumerated in the State Constitution, was inherited directly from the State's colonial predecessor.

> It has often been said that the legislature of this state is clothed with all the powers of the British Parliament, except as restrained by the express or implied provisions of the Constitution. When the general doctrines of the English courts on this subject are given full scope, the conclusion is inevitable that the Parliament and the Crown together were not competent to grant to a private corporation, for private purposes, the seacoast around the island below the shore line, without violating established principles of law. (*Martin v. Waddell*, 16 Peters, 367). While I am not aware of any such restriction to be found in the Constitution of this state, in terms, yet, from the very nature of the question, it must be deemed to be inherent in the title and power of disposition. The title which the state holds and the power of disposition is an incident and part of its sovereignty that cannot be surrendered, alienated or delegated, except for some public purpose, or some reasonable use which can fairly be said to be for the public benefit.

Id. at 406, 39 N.E. at 402.

New Jersey: New Jersey has consistently asserted that her sovereignty over her shorelands extended to those lands subject to the ebb and flow of the tide. Navigability was never a deciding factor. In fact, New Jersey does not assert title claims to the beds of non-tidal, though navig-

able, waterways. Statutes passed by the New Jersey legislature from 1804 to the present, and New Jersey case law, confirm this.

In 1804 "An Act to Incorporate 'The Associates of the Jersey Company' " conveyed certain submerged lands under the tidal waters of the Hudson River. New Jersey Laws of 1804, page 367. The 1851 Wharf Act permitted a property owner of lands "situate along or upon tide waters" to build wharves or other structures out to the ordinary low water line, as long as they did not interfere with the public's right of navigation. Between 1804 and 1851, there were numerous conveyances by the Legislature of State tidal lands. In each instance the lands conveyed were described either originally, or at the time, as being "under water." In no case were the lands described as "navigable." In 1869, a comprehensive riparian statute was enacted that carefully distinguished between tidewaters, to which the State claimed title, and navigable waters. N.J.S.A. 12: 3-2 to 12: 3-9.[2]

Hence, from statehood 200 years ago to the present, the New Jersey legislature continuously referred to lands

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[2] *See also* N.J.S.A. 12:3-4 (as first enacted in 1869), that prohibited the filling in any land under water below *mean high tide*; N.J.S.A. 12:3-10 (1871), that permitted any riparian owners on *tidewaters* to obtain a conveyance of the submerged lands in front of their lands; N.J.S.A. 12:3-12 (1871), that permitted the conveyance of lands *under tidewater* to riparian owners *from the original high water line*; N.J.S.A. 12:3-17 (1875), that permitted the State to conduct surveys of State claims over the *tidewaters*; N.J.S.A. 12:3-18 (1877), that provided condemnation rights for owners adjacent to *tidelands*; N.J.S.A. 12:3-19 (1891) that states that "there are islands situate in the *tidal waters* of this State, the lands below *mean high water* adjoining to which are the property of this State"; N.J.S.A 12:3-26 (1910), that prohibited the laying of pipes *under tidal waters* without the State's consent; N.J.S.A. 12:3-28 (1927), regulating the construction of bridges over "any lands of this State flowed by the *tidal waters* thereof"; and N.J.S.A. 12:3-35 and 12:3-36 (1916) that permitted the State to convey lands of the State "now or formerly under *tidewaters*" for public parks. (Emphasis added in all references).

under tidewaters, or tidal lands, and has described the boundary between State and private lands as the "mean high water" line. When the legislature wished to reference navigable waters, it did so. When it spoke in terms of title to sovereign shorelands, it referred only to tidally influenced land.

The case law supports this conclusion as well. An early assertion of ownership of the State of New Jersey to the beds of non-navigable waters led to the decision of this Court in *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842). The introduction to *Martin* notes that the jury "found the premises in dispute are situated beneath the waters of the Raritan River and Bay, where the tide ebbs and flows," without any reference to its navigability. *Martin v. Lessee of Waddell*, 41 U.S. at 368. The Court upheld the power of the State to convey such lands, and found a conveyance from the East New Jersey Proprietors to be without effect. *See also Arnold v. Mundy*, 6 N.J.L. 1 (1821).

In an 1867 case, the New Jersey Supreme Court held:

> "The test by which to determine whether waters are public or private, is the ebb and flow of the tide. Waters in which the tide ebbs and flows - so far only as the sea flows and reflows, are public waters; and those in which there is no ebb and flow of the tide, are private waters." *Cobb v. Davenport*, 32 N.J.L. 369, 378 (Sup. Ct. 1867).

This decision was reaffirmed in 1876 by the New Jersey Court of Errors and Appeals, which held:

> "In *Cobb v. Davenport* ... the notion that actual navigability was the criterion of public or private ownership in the bed of waters was distinctly repudiated, and the doctrine that the ebb and flow of the tide furnished such criterion was expressly adopted as a *principle of the common law* so well settled that a citation of authorities was

> deemed unnecessary." (Emphasis added). *Attorney General v. Delaware & Bound Brook R.R. Co.*, 27 N.J. Eq. 631, 639 (E & A 1876).

The inescapable conclusion reached by an examination of the statutory and case law of New Jersey is that there was a consistent assertion of title by the State to its shorelands subject to the ebb and flow of the tide from the earliest times. These State claims were made in legislation starting in the early 1800s, and were strongly upheld by the New Jersey courts as conforming with the common law or English rule of title.[3]

Pennsylvania: The Pennsylvania Supreme Court expressed its view in 1837, that "[I]t seems agreed, that between low water and ordinary high water of the ocean, and wherever the tide ebbs and flows, is part of the com-

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[3] In their *amicus curiae* brief, the City of Elizabeth *et al.* make the assertion that the State of New Jersey abruptly and retroactively changed its claim of ownership to tidal lands in the late 1950s. They cite several cases in support of their position that New Jersey substantive property law required a dual test of navigability and tidal ebb and flow for State sovereign ownership until the late 1950s. *Amici* brief of City of Elizabeth, at 18. "An examination of those cases reveals that the word 'navigable' was either used in connection with a body of water concededly navigable, or that the word was employed gratuitously as an additional word of description." *Schultz v. Wilson*, 44 N.J. Super. 591, 602, 131 A. 2d 415, 422 (App. Div. 1957). Another leading case in which certain language refers to navigability is *Stevens v. Paterson & Newark R.R. Co.*, 34 N.J.L. 532, 3 Am. Rep. 269 (E. & A. 1870), which upheld a State riparian conveyance along a navigable river. Any confusion that remained after the *Stevens* case was resolved in *Marcus Sayre Co. v. Newark*, 60 N.J.Eq. 361, 369 (E. & A. 1900) where the court held:

> "The title to a tidal stream below ordinary high tide is in the State as absolute owner. The decision of this court in *Stevens* . . . placed the law on this subject on a firm foundation as a finality."

Thus, the position taken by the amici City of Elizabeth *et al.* is untenable, being unsupportable by either the substantive law or case law of New Jersey.

mon highway. ... In England, this is said to be vested in the king; here it is in the State." *Ball v. Slack*, 2 Whart 508, 539 (Pa. 1837). By various acts of the legislature, however, the owner of lands bounded by navigable water could also hold title to the tidelands between high and low water mark, subject to the public right of navigation, and to the authority of the legislature to make public improvements upon it, and to regulate his use of it. *See Shively v. Bowlby*, 152 U.S. at 22.

Delaware: In a boundary dispute case involving lands below tidal water, this court has stated that, in Delaware, "The title to the soil, which was subject to *jus publicum* while it was vested in the king and his grantees, is subject to the same restrictions in the ownership of Delaware". *State of New Jersey v. State of Delaware*, 291 U.S. 361, 372, 373, (1933). As noted in an early Delaware Supreme Court decision, the restrictions of this *jus publicum* in Delaware were summarized as follows:

> In all navigable waters, where the tide ebbs and flows, the people have of common right the privilege of fishing, and of navigation, between high and low water mark, though it be over private soil.

Bickel et al. v. Polk, 5 Del. (Harr.) 325, 326 (1851). Further, "the public have the right to take fish below high water mark, though upon soil belonging to an individual, and would not be trespassing in so doing . . ." *Ibid.* Thus, though a riparian owner can hold title down to the low water mark in Delaware, the riparian owner's title is subject to the public's *jus publicum* rights that exist below the highwater mark. It has also been stated that the tidelands in Delaware, which are subject to the public's trust rights, is not "limited to that appurtenant to an ocean. On the contrary, foreshore can be found along any tidal water". *Phillips v. State, Ex. Rel. Department of Natural Resources*, 449 A.2d 250, 255 (1982), *citing State v. Penn-*

sylvania Railroad Company, 228 A.2d 587 (1967) *aff'd* 267 A.2d 455 (1969).

Delaware also gave special statutory protection to its tidelands. Until 1843 adverse possession against the State was prohibited. In that year, however, the legislature authorized adverse possession against State land "other than salt marsh". 9 Del. L. 454 (1843). In 1852 this law was amended to exclude not only salt marsh, but also "beach or shore" lands.

Thus, although Delaware allowed private ownership of tidelands down to the low water mark, the public rights to use the tidelands, emanating from the English Common Law, were preserved. Tidelands impressed with the trust servitude at the time the Constitution was adopted, whether publicly or privately held, were not only those shorelands in Delaware adjacent to waters that were navigable-in-fact, but were those shorelands "found along any tidal water," *Phillips v. State*, 449 A.2d at 255; *i.e.*, wherever the tide ebbed and flowed.

Maryland: In Maryland, the shorelands between mean high water and mean low water passed by grant of the 1632 Charter of Maryland (Article IV) by Charles I to Caecillius Calvert, Baron of Baltimore. Thus at that time the tidelands were owned by the Crown. *Browne v. Kennedy*, 5 H. & J. 195 (Md. 1821). After the Revolution, the tidelands were held by the State for the benefit of the public by virtue of Article 5 of the Declaration of Rights in the Maryland Constitution. *Board of Public Works v. Larmar Corp.*, 262 Md. 24, 277, A.2d 427 (1971); *Kerpelman v. Board of Public works*, 261 Md. 436, 276 A.2d 56 (1971), *cert. denied*, 404 U.S. 858 (1971). *See also Day v. Day*, 22 Md. 530 (1865); *Baltimore v. McKim*, 3 Bland 453 (1831).

Prior to the enactment of the Act of 1862 (now Maryland Code Art. 54, sec. 48) there were instances where the State issued patents for land under navigable water,

defined by Maryland cases as "water where the tide ebbs and flows," with the patents being subject to the public rights to navigation and fishery. *Board of Public Works v. Larmar Corp., supra* at 47, 277 A.2d at 438; *Dept. of Natural Resources v. Ocean City*, 274 Md. 1 332, A.2d 630 (1975); *Van Ruymbeke v. Patapsco Industrial Park*, 261 Md. 470, 475, 276 A.2d 61, 64 (1971).

Virginia: In Virginia, the law at the time of adoption of the Constitution was a codification of the English common law, the Act of May 1780 (10 Hen. Stat. at Large, p. 226). This Act reserved "[A]ll unappropriated lands on the Bay of the Chesapeake, or the sea shore, or the shores of any river or creek" for use "as a common to all of the good people" of the Commonwealth. *Garrison v. Hall & als.*, 75 Va. 150, 160 (1881). The object of this Act was held to be "to reserve the right of fishing,...fowling and hunting, being only coextensive therewith, as a common right of the people of the State, as an aquatic right on the public waters, which embraced the shores and the lands adjacent to them, so far as necessary for the enjoyment of those rights . . .". *Id.* at 163. Most noticeable about this statutory language is that the shorelands held in trust "for all the good people" of Virginia were not delimited from the high water mark down, but included all the adjacent lands "so far as necessary for the enjoyment of those rights."

A Virginia Legislature Act of 1819 extended to the low water mark the seaward boundary of an upland owner's property, if the grant was made prior to 1780. However, even though title was in the upland owner, the shoreland remained subject to the public's right to fish, fowl and hunt. *See Bradford v. Nature Conservancy*, 224 Va. 181 (1982). Thus, any grant of the shorelands made after 1780 was "void," and such lands today are "held as a common" as they were 200 years ago. *Ibid.*

North Carolina: The Supreme Court of North Carolina has long established that where the waters covering lands are "navigable in law," those lands are held in trust by the State for the benefit of the public. *See Wilson v. Forbes*, 13 N.C. (2 Dev.) 31 (1828); *Shepard's Point Land Co. v. Hotel*, 132 N.C. 517 (1903). Waters that were "navigable at law" under the common law of England were those waters "where the tide flows and ebbs." *Wilson v. Forbes*, 13 N.C. at 38.

The Supreme Court of North Carolina has regularly applied the rule of public trust ownership of the bed to tidal, and non-tidal but navagable-in-fact, waters. See *Ingram v. Threadgill*, 14 N.C. (3 Dev.) 59 (1831); *State v. Twiford*, 136 N.C. 603, 48 S.E. 586 (1904). In the seminal case of *State v. Glen*, 52 N.C. (7 Jones) 321 (1859), the court reviewed its prior decisions and reaffirmed the primary classes of waters which continue to be recognized: public trust beds and private beds. The *Glen* court recognized that public trust ownership of the bed extends both to all lands subject to the ebb and flow of the tides to the farthest influx of salt water, *Collins v. Benbury*, 25 N.C. (3 Ired.) 277 (1842), and to all waters navigable by "sea vessels" as defined in *Wilson v. Forbes, supra.*

The boundary of the reserved submerged lands in North Carolina has always been the margin of the water body, i.e. the line of ordinary high water. *Ward v. Willis*, 51 N.C. (6 Jones) 183 (1858). More recently, the Supreme Court of North Carolina has defined the boundary of private/public trust ownership, in areas subject to lunar tides as the high water line of the foreshore. The foreshore is further described as an area where the public can walk when the tide is low, and ride in boats when it is high. *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 177 S.E. 2d 513 (1970).

Accordingly, North Carolina held her shorelands at the time of the adoption of the Constitution, and continues to

hold today, the bed of tidal waters, whether such lands are navigable or non-navigable, including mudflats and other areas exposed at low tide, in its trust capacity. Thus, the law of North Carolina is consistent with the law as decided by the Supreme Court of Mississippi.

South Carolina: In South Carolina, in accordance with the common law, the title to land under tide waters was in the State, and a grant of land bounded by such waters passed no title below high water mark. Thus, in 1884, the South Carolina Supreme Court, relying on the expression of the common law in *United States v. Pacheco*, 69 U.S. (2 Wall.) 587, 590 (1864), ruled that title to several hundred acres of salt water marshland "below the line of high water-mark, and subject to the daily ebb and flow of the tides" was held by the State. *State v. Pinckney*, 22 S.C. Rep. 484, 508 (1884).

The *Pinckney* court closely examined the common law on shorelands in order to answer the question presented to the court. "But finding it incumbent upon us to decide the question, seeing clearly the rule of the common law, and failing to find any authoritative decision which changes that rule, we must hold that it is now [in 1884], as it always has been, the law of the State." *Id.* at 509. Thus, at the time of statehood when the United States Constitution was adopted, South Carolina applied the common law to its shorelands, that is, those lands below the line of high water-mark, and subject to the daily ebb and flow of the tides" were held by the State.

Georgia: Georgia adopted the general common law rule that the boundary of private landowners abutting on the sea "or upon any estuary, tidal stream, or arm of the sea where there was a regular rise and fall of the tide" extended only to high water mark, the soil between high water mark and low water mark being the property of the State. *Johnson v. State*, 114 Ga. 790, 791, 40 S.E. 807, 808 (1901). The Georgia Supreme Court noted in 1901

that this rule had been "almost universally followed in the United States." *Ibid.* While the first Georgia Code adopted in 1863 expanded the concept of State-owned waters to include those freshwater rivers which are navigable-in-fact, the Georgia Supreme Court concluded that the Georgia statute which accorded to the adjacent landowner title to the bed of non-navigable stream did not apply to tidewaters. Lands subject to the ebb and flow of the tide, even if not navigable-in-fact, remained publicly-owned tidelands. *Ibid.*

With rare exceptions, grants along the coast of Georgia made during the colonial period and the early years of statehood did not convey any adjacent tidelands, whether navigable-in-fact or not. In a dispute over oyster rights in a stream subject to the ebb and flow of the tide and not navigable-in-fact, the Supreme Court of Georgia held that the non-navigable streams and adjacent marshes were not included in the Grant from King George II; the non-navigable creeks and marshes were public lands subject to a public oyster lease. *Oemler v. Green*, 134 Ga. 198, 67 S.E. 433 (1910). As a result, in the absence of a specific grant from the Crown or the State, private ownership in Georgia extends only to the upper limit of the salt marsh, which is co-extensive with the upper reach of the regular ebb and flow of the tide. Because of the tidal range averaging seven feet and the gently sloping shore along the coast of Georgia, the upper limit of the salt marsh extends not only above the point of navigability-in-fact, but also above the elevation of mean high water.

While there have been specific grants of title and other rights in lands covered by tidewaters, such private ownership remains subject to the public trust rights of navigation, transportation and public passage, regardless of navigability-in-fact of the adjacent waters. Ga. Laws, 1902, p. 108; Ga. Code Ann. sec. 44-8-8 (1982). In addition, the public has the right to fish in all waters subject to the ebb and flow of the tide, whether navigable or non-navig-

able. *West v. Baumgartner*, 124 Ga. App. 318, 184 S.E. 2d 533 (1971), *reversed on other grounds*, 228 Ga. 671 (1972).

As stated by this Court in *Shively v. Bowlby*, "[T]he foregoing summary of the laws of the original States shows that there is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public." *Shively v. Bowlby*, 152 U.S. at 26. Nonetheless, some characteristics are common to all thirteen of the original States.

First, all thirteen original States, in their individual "views of justice and policy" have determined that they retain a public trust interest in their shorelands subject to the ebb and flow of the tide, regardless of the navigability of the adjacent water. Second, each of the thirteen original States, based on its own law, has determined the extent of their public trust shorelands. That is, each has individually defined, either legislatively or judicially, what the term "high water mark" means for its State. Most have determined this term to mean the "mean high tide line," in accordance with the Lord Chancellor Cranworth's interpretation of the English common law, while Georgia and Virginia, based on their laws, geography and usage, have determined that their trust shorelands extend up above the mean high water mark.

It is clear that each and every one of the thirteen original States made clear and definitive claims of ownership, or control, over the lands subject to the ebb and flow of the tide, without regard to the navigability of the adjacent water, at the time the Constitution was adopted. Thus, all shorelands subject to the ebb and flow of the tide, and at least up to the mean high tide line, whether owned out-

right by the States or privately held subject to the trust servitude, formed the corpus of the shoreland trust at the time the Constitution was adopted. As this trust was funded at the time of adoption of the Constitution, so has it been perpetuated by the Equal Footing Doctrine to the other 37 States that have since joined the Union.

B. The shorelands reserved by the States at the time of adoption of the Constitution were defined and delimited by the uses of the shorelands, and not solely by the criterion of whether the adjacent water was navigable. The public uses were not limited to navigation, but also included fishing, hunting, fowling, and bathing, among others.

Petitioners assert that a State's public trust shorelands, acquired upon admission to the Union on an equal footing with the original 13, include only those shorelands of waterways that are navigable-in-fact. To the contrary, in addition to tidality, the colonial shorelands imbued with the public trust were defined and delimited by the *uses* of the shorelands, and not solely by the criterion of whether the adjacent water was navigable-in-fact or not.

The uses of the shorelands 200 years ago by the citizens of the thirteen original States clearly included more than just navigation. The public trust doctrine traditionally provided that trust property was for the benefit of the public for navigation, commerce and fishing. *See* Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 Cornell L. Rev. 761, 801 (1979). But the shoreland uses "common to all the people" have been recorded as including "passing and repassing, navigation, fishing, fowling, sustenance, and all other uses of the water and its products . . .". *Arnold v. Mundy*, 6 N.J.L. (1 Hal.) 1, 76 - 77 (1821). The floating of logs from timbering operations was a recognized public use of tidewaters in New Hampshire. *See Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 5 (1889). Bathing,

the grazing of live stock, and transportation by high-wheeled carts pulled by "beach ponies" are recorded public uses of the shorelands in North Carolina around the end of the Revolution. *See* Dunbar, Gary S., *Historical Geography of North Carolina Outer Banks* (1958), at 20. The gathering of seaweed for fertilizer was commonplace in Connecticut 200 years ago, and was a protected public use of the tidelands. *See Chapman v. Kimball*, 9 Day at 38. In Rhode Island, "among the common-law rights of the public in the shore . . . are rights of fishing from the shore, taking seaweed and drift-stuff therefrom, going therefrom into the sea for bathing, and also as necessary for the enjoyment of any of these rights, and perhaps as a separate and independent right, that of passing along the shore." *Jackvony v. Powel*, 67 R.I. 218 (1941). As noted *supra*, Virginia recognized "fishing, hunting and fowling" as recognized uses in 1780 that were afforded trust protection, and defined the extent of these reserved shorelands as including all the adjacent lands "so far as necessary for the enjoyment of those rights." *Garrison v. Hall and als.*, 75 Va. at 163.

Fishing, as the term was understood in this country prior to the adoption of the Constitution, included the harvesting of shell fish as well as "floating fish." *Martin v. Waddell*, 44 U.S. (16 Pet.) 367, 413. The harvesting of this source of food was of great importance to the early settlors. "The men who first formed the English settlements, could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers .. if the settlor on the fast land thereby was excluded from this enjoyment, and unable to take shell-fish from its bottom, or fasten there a stake, or even bathe in its waters . . .". *Id.* at 414; *cf. Arnold v. Mundy*, 6 N.J.L. at 92. The harvesting of shellfish, by the very nature of clams, oysters, mussels and the like, quite com-

monly occurred in tidelands bordering waters that were not navigable-in-fact.

Obviously a waterway must be navigable-in-fact for it to be used for navigation. But what was considered a navigable waterway 200 years ago may not be so considered today. Indeed, historically, navigability was legally defined by the "flowing of the tide;"waterways upstream from the "flow of the tide" were by legal definition non-navigable. *See*, Angell, Joseph K., *A Treatise on the Right of Property in Tide Waters*, Little and Brown, Boston, 1847, Chapter III, at 73, *citing The Case of the Royal Fishery*, Davies's R. 149; Hale, *De Jure Maris*; *Sir Henry Constable's Case*, 5 Co. R. 107. *See also*, 1 *Swift Digest* 109 (1822), Ch. III, *Of the Right to the Ocean, Navigable Rivers, and Rivers not Navigable*. In addition, navigable watercraft two centuries ago included shallow draft, flat bottom vessels that were designed to be hauled up the beaches for stowage or repair, or manually propelled through very shallow marshes for fishing, hunting, or the discharge of passengers and cargo. Clearly, for these type of vessels, the shallow tidal creeks and streams in marshes and salt meadows were considered navigable waters.

But navigability was not a requisite for the thirteen original States to hold their tidal shorelands in trust. Many of the uses commonly made of the trust shorelands by the citizens of the thirteen original States 200 years ago were not physically or logically dependant upon whether the adjacent waters to the shorelands were navigable-in-fact. Many tidal wetlands good for fowling 200 years ago undoubtedly were worthless for navigation. Bathing in tidal waters was not limited to where the adjacent waters were navigable. The harvesting of clams, seaweed and the like on vast tidal mudflats certainly occured on non-navigable waters. Land transportation along the naturally obstruction-free upper shorelands undoubtedly was very important 200 years ago for the simple reason that the adjacent waters were not always navigable-in-fact.

One can only conclude that Petitioners' assertion—that only those shorelands adjacent to waters that were navigable-in-fact were reserved by the thirteen original States when the Constitution was adopted—is unfounded when the historical uses of these shorelands by our ancestors 200 years ago is considered. To hold that the thirteen original States only reserved shorelands adjacent to navigable-in-fact waters would be to ignore the States' recognition of the other legitimate public uses of the trust shorelands that are independent of the navigability of the adjacent waters: such as passing and repassing, fowling, hunting, shell fishing, land transportation, gathering seaweed and "drift stuff," and bathing. Not only did the thirteen original States collectively reserve their tidal shores for these purposes, but the extent of the shorelands so reserved was delimited by the uses. That is, the tidal shorelands were reserved "so far as necessary for the enjoyment of those rights." *Garrison v. Hall & als.*, 75 Va. at 160.[4]

C. Each new State upon entering the Union possessed the sovereign authority to define both the nature of her sovereignty over, and the physical boundaries of, her trust shorelands to the same extent as the thirteen original States.

The rules of property to be employed by a State over its shorelands are for each State to determine as an adjunct of its sovereignty over these lands. "[A]s a general proposition, the law of real property is, under our Constitution, left to the individual States to develop and administer." *Hughes v. Washington*, 389 U.S. 290, 295 (1967)

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[4] *Amici* do not imply that the existence of a public trust in the tidelands at issue is dependent upon whether ownership of that land passed to the state upon statehood. If the Court should rule that title to these tidelands remained in the federal government upon Mississippi's statehood and subsequently passed to the private parties, that land would still be impressed with a public trust. The extent of that trust is not presented in this case.

(Stewart, J., concurring). *See also Barney v. Keokuk*, 94 U.S. 324, 338 (1876). "Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law." *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. at 22. Thus, it is within a State's sovereign power to adopt, modify or reject common law rules. Incident to this sovereign power is a State's right to determine the boundaries of its shoreland trust, and the public uses for which the shorelands are held in trust. "[T]he rigid rules of the common law of England relating to littoral and riparian rights are not adoptable in every particular to our political and geographical conditions; that in adopting the common law of the mother country we did not incorporate into our system of jurisprudence any principals which are essentially inconsonant with our circumstances or repugnant to the spirit of our institutions ..." *Barnes v. Midland R.R. Terminal Co.*, 193 N.Y. 378, 384, 85 N.E. 1093, 1096 (1908).

"The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands below the high water mark, within their respective jurisdictions." *Shively v. Bowlby*, 152 U.S. at 26. Thus, as each new State entered the Union, she acquired the same rights and authorities as the thirteen original States to deal "with the lands under the tide waters within its borders according to its own views of justice and policy." *Shively v. Bowlby*, 152 U.S. at 26. Each new State, in its own trustee capacity, upon entering the Union had the authority to define both the nature of her sovereignty over, and the physical boundaries of, her trust shorelands to the same extent as the thirteen original States.

Nonetheless, Petitioners assert that Mississippi would acquire a "more-than-equal" footing by claiming as public trust shorelands those lands "subject to the ebb and flow of the tide" below the mean high tide line. Petitioners' Petition for a Writ of Certiorari, at 9. But as has been

shown, the colonial law, and the law of the individual States at the time of the adoption of the Constitution, clearly provided that the shorelands withheld by the thirteen original States were defined by the ebb and flow of the tide, without regard to the navigability-in-fact of the adjacent waters. Thus the remaining coastal States that have joined the Union, such as Mississippi, acquired the same trust corpus as did the thirteen original States—those land subject to the ebb and flow of the tide, regardless of the navigability-in-fact of the adjacent water, and at least up to the mean high tide line.

CONCLUSION

Reviewing the statutory and case law of the thirteen original States, and examining the usages that their citizens made of the tidal shorelands 200 years ago affirms that Petitioners' assertion—that only those shorelands adjacent to waters that were navigable-in-fact were reserved by the thirteen original States when the Constitution was adopted—is unfounded.

All of the thirteen original States, in their individual views of justice and policy determined what waters and tidelands they reserved 200 years ago when the Constitution was adopted. Each of the thirteen original States, based on its own law as it evolved from the English common law, determined the extent of their public trust shorelands as those lands subject to the ebb and flow of the tide up to the "high water mark." Each individually defined, either legislatively or judicially, what the term "high water mark" meant for its State. At the time the Constitution was adopted, most determined this term to mean the "mean high tide line." Some, however, based on their laws, determined that their shorelands extended above the mean high water mark.

Many of the uses commonly made of the trust shorelands by the citizens of the thirteen original States 200

years ago were not physically or logically dependant upon whether the adjacent waters to the shorelands were navigable-in-fact. The thirteen original States reserved those shorelands to the extent necessary to assure their citizens the enjoyment of those rights.

As each new State entered the Union, she acquired the same rights and authorities as the thirteen original States had. Each new State, in its own trustee capacity, upon entering the Union had the authority to define both the nature of her sovereignty over, and the physical boundaries of, her trust shorelands to the same extent as the thirteen original States.

Thus, all shorelands subject to the ebb and flow of the tide, and at least up to the mean high tide line, whether owned outright by the States or privately held subject to the trust servitude, formed the corpus of the trust at the time the Constitution was adopted. As this trust was funded by the thirteen original States at the time of adoption of the Constitution, so has it been perpetuated by the Equal Footing Doctrine to the other 37 States that have joined the Union. As a result, each new State that has entered the Union, such as Mississippi, received in trust those shorelands subject to the ebb and flow of the tide up to, at the very least, the mean high tide line.

For these reasons, we urge this Honorable Court to affirm the decision of the Mississippi Supreme Court.

Respectfully submitted,

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